IN THE SUPREME COURT OF MISSOURI

State of Missouri ex rel. Atmos Energy Corporation, et al. Appellants, vs. Public Service Commission of the State of Missouri, et al., Respondents	)	
and	)	SC84344
Ameren Corporation and Union Electric Company, d/b/a AmerenUE, Appellants, vs. Public Service Commission of the State of Missouri, et al., Respondents	)	

Appeal from the Cole County Circuit Court, Division I
Honorable Thomas J. Brown III, Judge.
Transferred from Missouri Court of Appeals, Western District
Case No. WD59196 consolidated with WD59197
Transfer Ordered April 23, 2002

SUBSTITUTE INITIAL BRIEF OF APPELLANTS ATMOS ENERGY CORP., MISSOURI GAS ENERGY, LACLEDE GAS CO., AND TRIGEN-KANSAS CITY ENERGY CORP.

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Jurisdictional Statement

Appellants Atmos Energy Corp., Missouri Gas Energy, Laclede Gas Co., and Trigen-Kansas City Energy Corp. sought a writ of review pursuant to § 386.510 RSMo 2000 from decisions of the Missouri Public Service Commission ("Commission") in cases involving administrative rulemakings by that state agency. Appellant Ameren Corporation did also. The Circuit Court of Cole County issued a judgment which affirmed the Commission's decisions. All of the Appellants filed Notices of Appeal with the Western District of the Missouri Court of Appeals. The cases were consolidated and the matter briefed and orally argued, and the Western District issued an opinion on December 26, 2001, which was modified upon the court's own motion on March 5, 2002.

None of these issues to be raised on appeal are within the exclusive jurisdiction of the Missouri Supreme Court. Accordingly, the Western District had jurisdiction of the appeal, pursuant to general appellate jurisdiction, as more particularly set forth in Article V, Section 3 of the Missouri Constitution, as amended.

Pursuant to applications to transfer filed by the Appellants, however, the Supreme Court en banc ordered that this case be transferred to it by order dated April 23, 2002.

Statement of Facts

Respondent Commission is a state agency established by the Missouri General Assembly to regulate public utilities operating within the state of Missouri, pursuant to Chapters 386 and 393 RSMo 2000. All references to statutes are to RSMo 2000 unless otherwise indicated. Appellants Atmos Energy Corporation, Missouri Gas Energy and Laclede Gas Company are gas corporations and public utilities under the definitions in § 386.020 RSMo, and thus are subject to regulation by the Commission. Appellant Trigen-Kansas City Energy Corporation is a steam distribution company operating as a retail distributor of steam in Jackson County, Missouri, and is thereby subject to the jurisdiction of the Commission as a "heating company" under § 386.020 RSMo.

On April 26, 1999, the Commission filed proposed rules 4 CSR 240-20.015, 4 CSR 240-80.015, 4 CSR 240-40.015 and 4 CSR 240-40.016, with the Secretary of State (hereinafter "the Proposed Rules"). (L.F. 17, 496, 686, 1015) The Commission cited as its statutory authority, §386.250 RSMo. Supp. 1998 and § 393.140 RSMo 1994. (L.F. 19, 498, 688, 1017) The stated purpose of the Proposed Rules was to establish various requirements to be observed by electric utilities, steam heating utilities, and gas utilities in transactions involving the corporate affiliates or unregulated business activities of such utilities. (L.F. 23, 502, 692, 1021) The Proposed Rules were subsequently published on June 1, 1999 in the ***Missouri Register*** (Volume 24, No. 11, pp. 1346-1364). (L.F. 32,

511, 701, 1031)[1]

The Commission established separate cases for each of the Proposed Rules: Case No. EX-99-442 applying to electric utilities; Case No. HX-99-443 applying to steam heating utilities; Case No. GX-99-444 applying to gas utilities and Case No. GX-99-445 applying to gas utilities' marketing affiliates. The Notice of Proposed Rulemaking for each of the Proposed Rules indicated that interested parties could file written initial and reply comments, and that there would be a "public hearing." (L.F. 513, 703, 1034)

On July 1, 1999, certain participants[2] filed motions asking the Commission to adopt contested case procedures in the cases established by the Commission to consider the rulemakings[3]. (L.F. 546, 754, 1044) On August 10, 1999, the Commission issued its Order Denying Contested Case Procedures. (L.F. 624, 958, 1231) Associated Natural

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[1] After this point, these Appellants will omit Legal File references to the proposed rule relating to electric utilities since none of them are electric utilities.

[2] Associated Natural Gas Company (ANG) was a party to the Commission cases and the review in the circuit court of Cole County. ANG sold its gas utility properties in Missouri to Appellant Atmos in 2000. (L.F. 1311) ANG ceased participation in this appeal thereafter.

[3] Filings were made by Appellants and others in the four separate Commission cases. In some situations, multiple filings of the same pleading were made. Therefore, in several instances in the Commission Case Papers, the same pleading appeared multiple times. These duplicates were omitted in the preparation of the Legal File.

Gas Company, Laclede Gas Company, Missouri Gas Energy, and Trigen-Kansas City Energy Corporation were among several utilities who filed applications for rehearing of that Order. (L.F. 449, 630, 961, 1238)

As indicated by the Order Denying Contested Case Procedures, the Commission did not allow Appellants to make objections or cross-examine opposing witnesses or present rebuttal testimony. (Transcript Vol. 1 at 3, lines 14-17; Tr. Vol. 2 at 76, lines 14-17; Tr. Vol. 3 at 3, lines 22-25) The Commission allowed some elements of contested case procedures such as discovery and the enforcement of same. (L.F. 1222-1230) The Commission adopted procedures under which the parties were limited to submitting comments on and to participating in public "hearings" concerning the Proposed Rules. Those "hearings" were held on September 13, 14 and 15, 1999. (See, Transcript) At the hearing, most of the Appellants stated objections to the procedure but did participate in both the submission of comments and the public hearings. (Tr. Vol. 1 at pp. 13-15; Tr. Vol 3 at 8, lines 6-14; Tr. Vol. 3 at 16, lines 5-7; Tr. Vol. 3 at 32, lines 3-9)

On November 16, 1999, the Commission issued orders of rulemaking (the "Orders") in Case Nos. HX-99-443, GX-99-444 and GX-99-445. (L.F. 636-648; 963-976; 1240-1255) One commissioner dissented. (L.F. 649, 962, 1239)

On December 15, 1999, Appellants filed applications for rehearing, reconsideration, and requests for stay concerning the Orders. (L.F. 654-663; 981-990; 1260) On January 11, 2000, the Commission issued its consolidated order denying rehearing. (L.F. 476-478)

Pursuant to § 386.510 RSMo, Appellants sought a writ of review from the Circuit Court of Cole County. (L.F. 1268-1275) A writ of review was issued on February 8, 2000. (L.F. 1281) The case established by the writ of review taken by these Appellants was consolidated with a similar writ of review proceeding taken by Ameren Corporation and Union Electric Company d/b/a AmerenUE. (L.F. 1282) On September 11, 2000, the circuit court entered judgment in favor of the Commission. (L.F. 1303-1309). On October 3, 2000, the circuit court entered its Order and Judgment Concerning Stay and Order Nunc Pro Tunc. (L.F. 1310-1312)

The Order and Judgment Concerning Stay and Order Nunc Pro Tunc provided that the stay issued by the Circuit Court is to remain in effect as to the parties that requested it until the conclusion of final judicial review. (L.F. 1312)

The Appellants on this brief filed their Notice of Appeal on October 19, 2000. (L.F. 1313-1318) Appellant Ameren Corporation and Union Electric Company d/b/a AmerenUE filed their Notice of Appeal on October 19, 2000. (L.F. 1319-1324) These appeals were consolidated and heard by the Western District of the Missouri Court of Appeals and then after opinion, transferred to this Court.

Points Relied On

I.

The Public Service Commission Erred in its Orders of Rulemaking Because Although it Was Required By § 386.250(6) RSMo to Consider Evidence as to Reasonableness at a Hearing Prior to Issuing the Orders of Rulemaking, It Did Not Do So, and Therefore, the Decision Is Subject to Appellate Review Pursuant to § 386.540.1 RSMo, in That the Commission Committed an Error of Law When It Failed to Provide Sufficient Contested Case Procedures in the Rulemaking Proceedings and Therefore Did Not Produce "Evidence" as Required by § 386.250(6) RSMo Which States That "... a Hearing Shall be Held At Which Affected Parties May Present Evidence as to the Reasonableness of Any Proposed Rule."

Cases

Rombach v. Rombach, 867 S.W.2d 500 (Mo. 1993).

State ex rel. Kansas City Public Service Co. v. Waltner, 169 S.W.2d 697 (Mo. 1943).

State ex rel. Yarber v. McHenry, 915 S.W.2d 325 (Mo. banc 1995).

Conlon Group, Inc. v. City of St. Louis, 944 S.W.2d 954 (Mo. App. W.D. 1997).

Statutes and Other Authorities

§386.250 RSMo

§393.140 RSMo

§536.010(2) RSMo

§536.021.2(2) RSMo

20 ***Missouri Practice Series, Administrative Practice and Procedure*** § 6.39

II.

The Public Service Commission Erred in its Orders of Rulemaking Because Although it Was Required by § 536.021.2 and § 536.021.6(4) RSMo To Publish the Reasons Why The Proposed Rules Were Necessary and to Publish a Concise Summary of the Agency's Findings With Respect to the Merits of Testimony or Comments Opposed to the Proposed Rules, it Did Not Do So, and Therefore, The Decision Is Subject to Appellate Review Pursuant to § 386.540.1 RSMo, in That the Commission Committed an Error of Law When It Failed to Comply With the Requirements of § 536.021.2 and § 536.021.6(4) RSMo.

Cases:

State ex rel. General Telephone Co. of the Midwest v. PSC, 537 S.W.2d 655 (Mo.App. 1976).

Statutes:

§536.021 RSMo

III.

The Public Service Commission Erred in its Orders of Rulemaking Because Although it Was Required by § 536.016 RSMo to Propose Rules Based Upon Substantial Evidence on the Record and a Finding that the Rule Is Necessary to Carry Out the Purposes of the Statute That Granted It Rulemaking Authority, It Did Not Do So, and Therefore, The Decision Is Subject to Appellate Review Pursuant to § 386.540.1 RSMo, in That The Commission Committed an Error of Law When It Violated § 536.016 RSMo.

Cases:

State v. Thomaston, 726 S.W.2d 448 (Mo.App.W.D. 1987).

Clark v. Kansas City, St. L. & C. R. Co., 219 Mo. 524, 118 S.W. 40 (1909).

Statutes:

§536.016 RSMo.

IV.

The Public Service Commission Erred in its Orders of Rulemaking Because Although it Was Required by § 393.140(5) RSMo To Hold a Hearing and Determine Whether A Utility's Existing Methods or Practices are Unjustly Discriminatory or Unduly Preferential Before Prescribing New Requirements, It Did Not Do So, and Therefore, The Decision Is Subject to Appellate Review Pursuant to § 386.540.1

RSMo, in That The Commission Committed an Error of Law When It Violated § 393.140(5) RSMo.

Statutes:

§393.140 RSMo

V.

The Public Service Commission Erred in its Orders of Rulemaking Because the Rules are Beyond the Subject Matter Jurisdiction of the Commission, and Therefore, the Commission's Decision to Adopt the Rules is Subject to Appellate Review Pursuant to § 386.540.1 RSMo, In That the Rules Conflict With § 386.030 RSMo and § 393.140(12) RSMo Because They Purport to Bring Unregulated Business Activities Under the Jurisdiction of the Commission and Indirectly Impose Record-keeping Requirements on Unregulated Entities.

Cases:

State ex rel. General Telephone Co. of the Midwest v. PSC, 537 S.W.2d 655 (Mo.App. 1976).

State ex re. Kansas City Transit, Inc. v. PSC, 406 S.W.2d 5 (Mo. 1966).

State ex rel. Gulf Transport Co. v. PSC, 658 S.W.2d 448 (Mo.App. 1983).

Statutes:

§386.030 RSMo

§386.756 RSMo

§393.140 RSMo

Other Authorities:

FERC Stats. and Regs., CCH ¶ 24,848; 18 CFR § 284.8.

FERC Stats. and Regs., CCH ¶ 24,979; 18 CFR § 284.402.

VI.

The Public Service Commission Erred in its Orders of Rulemaking Because the Rules Contain Impermissibly Vague, Ambiguous and Inconsistent Provisions, and Therefore, the Commission's Decision to Adopt the Rules is Subject to Appellate Review Pursuant to § 386.540.1 RSMo, In That the Commission Has Committed an Error of Law By Violating State and Federal Constitutional Provisions Relating to Due Process.

Cases:

Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 332 (1926).

Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

State v. Young, 695 S.W.2d 882 (Mo. banc 1985).

McDonald's Corp. v. Nelson, 822 F. Supp. 597, *aff'd sub nom.* ***Holiday Inn Franchising, Inc. v. Branstad***, 29 F.3d 383 (8th Cir. 1994), *cert. denied* 513 U.S. 1032 (1994).

Statutes:

§ 386.500 RSMo

§ 386.510 RSMo

§ 386.570 RSMo

Other Authorities:

United States Constitution, Fifth and Fourteenth Amendments

Constitution of Missouri, 1945, Article I, § 10

VII.

The Public Service Commission Erred in its Order of Rulemaking Regarding 4 CSR 240-80.015 Because the Statutory Authority Cited by the Commission for the Proposed Rule Does Not Authorize the Adoption of the Rule, and Therefore, the Commission's Decision to Adopt that Rule is Subject to Appellate Review Pursuant to § 386.540.1 RSMo, In That the Commission Has Committed an Error of Law By Acting Beyond Its Statutory Authority in Promulgating the Rule and Its Failure to Cite Appropriate Statutory Authority Renders the Rulemaking Void Pursuant to § 536.021.7 RSMo.

Statutes:

§ 386.250 RSMo

§ 393.140 RSMo

§ 393.290 RSMo

§ 536.021 RSMo

Point VIII.

The Missouri Court of Appeals, Western District, Erred in Determining That it Lacked Jurisdiction to Consider the Merits of the Case Because the General Assembly Intends for All Orders or Decisions of the Commission, Including Orders of Rulemaking, to Be Subject to Review by the Courts in the Exclusive Manner Prescribed in Sections 386.500 and 386.510 RSMo, and Has Exhibited No Intention of Legislatively Overruling This Court's Decision in *Union Electric Company v. Clark*, 511 S.W.2d 822 (Mo. 1974), In That The Most Recent Expression of Legislative Intent in § 386.515 RSMo Supp. 2001 Shows A Clear Directive That The Procedure in § 386.510 Is Exclusive; The Western District Erroneously Ascribes an Intent to the General Assembly Which Is Unsupported and Cannot Be Reconciled With Other Provisions of the Public Service Commission Law; The Western District's Opinion Relies Upon Incorrectly Construing General Statutes as Controlling Over Specific Provisions; and The Western District's Opinion Renders Meaningless the Jurisdictional Provisions in Supreme Court Rule 100.01 and § 536.100 RSMo.

Cases:

Union Electric Co. v. Clark, 511 S.W.2d 822 (Mo. 1974)

State ex rel. State Tax Commission v. Luten, 459 S.W.2d 375 (Mo. banc 1970)

State ex rel. Southwestern Bell Tel. Co. v. PSC, 592 S.W.2d 184 (Mo. App. W.D. 1979)

Statutes:

§ 386.270 RSMo

§ 386.500 RSMo

§ 386.510 RSMo

§ 386.515 RSMo Supp. 2001

Other Authorities:

Webster's New Twentieth Century Dictionary (Unabridged), World Publishing Co., 1971

Introduction

This case involves the judicial review of several administrative rules promulgated by the Respondent Missouri Public Service Commission ("Commission" or "PSC") that purport to govern transactions between certain regulated public utilities and their "affiliates." The Commission conducted four separate but contemporaneous rulemaking proceedings in the following designated cases:

- Case No. EX-99-442 - In the Matter of 4 CSR 240-20.015 Proposed Rule- Electric Utilities Affiliate Transactions
- Case No. HX-99-443 - In the Matter of 4 CSR 240-80.015 Proposed Rule- Steam Heating Utilities Affiliate Transactions
- Case No. GX-99-444 - In the Matter of 4 CSR 240-40.015 Proposed Rule- Gas Utilities Affiliate Transactions
- Case No. GX-99-445 - In the Matter of 4 CSR 240-40.016 Proposed Rule- Gas Utilities Marketing Affiliate Transactions

The result of those cases was four new rules: 4 CSR 240-20.015, 4 CSR 240-80.015, 4 CSR 240-40.015, and 4 CSR 240-40.016 (referred to herein collectively as "the Rules"). The Rules have been printed in the ***Code of State Regulations*** and took effect on February 29, 2000, except as to the Appellants, since the circuit court entered a stay on February 25, 2000.

The issues presented here include the Commission's failure to follow statutory requirements for the "hearings" it held, thus denying the Appellants statutorily-mandated

and essential due process rights such as cross-examination, and the Commission's lack of jurisdiction as to the subject matter of the rules. In various documents, the Commission has portrayed its rulemaking efforts as doing little more than requiring regulated utilities to keep adequate records so that the Commission will have information necessary to determine if utility ratepayers are subsidizing non-regulated operations of affiliated companies.

The Appellants do not disagree with the principle that regulated utilities should not subsidize their unregulated operations in a manner that would cause utility customers to pay more than a just and reasonable rate. Case law already clearly allows the Commission to ensure that through the rate setting process. Nor do these Appellants dispute the Commission's right to require regulated utilities to provide the information necessary to prevent such a result. What the Appellants object to in this appeal, however, is the Commission's attempt to pursue this objective through the promulgation of the Rules under review here. These Rules circumvent the statutory procedures for addressing such issues and venture into areas that the General Assembly long ago determined were beyond the jurisdiction of the Commission. The Commission may indeed have an implicit obligation under its enabling statutes to prevent cross-subsidization which disadvantages ratepayers, but it also has very *explicit* obligations under those same statutes to:

- permit utilities to conduct their substantially separate, non-jurisdictional businesses without Commission interference (§393.140(12) RSMo);

- afford utilities evidentiary hearings and make specific findings that they have actually engaged in discriminatory or preferential practices before fashioning remedies designed to prevent such abuses before they occur (§393.140(5) RSMo);
- afford utilities evidentiary hearings before establishing rules which prescribe the terms under which they must render utility service (§386.250(6)) or the accounts to which they must book various outlays and receipts (§393.140(8) RSMo); and
- permit utilities to engage in interstate sales of natural gas and other transactions free of Commission interference (§386.030);

None of these explicit statutory obligations are difficult to find. Indeed, most of them reside in the very same statutory sections the Commission cited as its authority for the Rules.

The Appellants expect the Commission to argue that whatever *implicit* power the Commission may have to prevent cross-subsidization is so broad and superior that it somehow trumps these *explicit* statutory requirements. As discussed in more detail below, it is impossible to reconcile such a view with any accepted precept of law or recognizable canon of statutory construction. Indeed, if taken to its logical conclusion, such a view suggests that by simply using the rulemaking process, the Commission may impose on utilities whatever service requirements or ratemaking results it deems appropriate, and do so without the need for any evidentiary record. Such a result would deny any opportunity for meaningful judicial review of the reasonableness of Commission actions, which is contrary to statutory requirements. The Court should reject this erroneous view of

unconstrained Commission authority and find that the Rules are unlawful and void.

Argument

Point I

The Public Service Commission Erred in its Orders of Rulemaking Because Although it Was Required By § 386.250(6) RSMo to Consider Evidence as to Reasonableness at a Hearing Prior to Issuing the Orders of Rulemaking, It Did Not Do So, and Therefore, the Decision Is Subject to Appellate Review Pursuant to § 386.540.1 RSMo, in That the Commission Committed an Error of Law When It Failed to Provide Sufficient Contested Case Procedures in the Rulemaking Proceedings and Therefore Did Not Produce "Evidence" as Required by § 386.250(6) RSMo Which States That "... a Hearing Shall be Held At Which Affected Parties May Present Evidence as to the Reasonableness of Any Proposed Rule."

Scope of Review

On appeal, the Commission's decision is reviewed, not the judgment of the circuit court. ***State ex rel. Office of the Pub. Counsel v. Public Serv. Comm'n***, 938 S.W.2d 339, 341 (Mo.App. W.D. 1997). The standard of review of decisions of the Commission is a

well-established two part test. Reviewing courts examine the Commission's order to determine whether it is lawful and reasonable. ***State ex rel. Midwest Gas Users' Assoc. v. Public Serv. Comm'n***, 976 S.W.2d 470, 476 (Mo.App. W.D. 1998). In determining whether a Commission decision is lawful, a reviewing court must exercise independent judgment and need not defer to the Commission, which has no authority to declare or enforce principles of law or equity. ***Id***.

Because the issue discussed in this point concerns a statutory provision by which the General Assembly has specifically limited the Commission's authority regarding rulemaking, and therefore is a question of law, this Court is not required to defer to the Commission. Instead, this Court must exercise independent judgment because the Commission has no authority to declare or enforce principles of law or equity. ***Id***.

Lack of "Evidence"

References to "the Rules" here means the finally adopted versions of 4 CSR 240-40.015, 4 CSR 240-40.016, and 4 CSR 240-80.015. In summary, the Commission was required by controlling statutory authority to consider "evidence" at an evidentiary hearing before adopting the Rules. The Commission did not do that.

"Evidence" is produced only when certain procedural safeguards, such as cross-examination and the opportunity to present rebuttal witnesses, are followed. Despite being advised in advance of the need to observe these procedural requirements and provide the safeguards in its rulemaking proceedings, the Commission refused to employ procedures

designed to produce "evidence." As a result of this major and fatal deficiency, the Commission ultimately based its decision on something other than "evidence" -- an approach which is in clear conflict with the controlling statutes.

Prerequisites to Exercise of Statutory Authority

The Commission is required by law to cite its statutory authority on which it bases its proposal in a notice of proposed rulemaking. § 536.021.2(2) RSMo. In this situation, the Commission cited §§ 386.250 RSMo. Supp. 1998 and 393.140 RSMo 1994 as statutory authority for adopting the Rules. Both of these statutory sections have numerous subsections. The Commission did not specify which particular subsection it was relying upon for its authority. Although both § 386.250 and § 393.140, or parts thereof, may relate in some degree to matters addressed by portions of the Rules, neither of them provide statutory authorization for the Commission's decision to use a pure rulemaking procedure, without the statutorily-required safeguard of "evidence," for purposes of regulating how utilities may price or otherwise conduct transactions involving their affiliates.

Although the statutory provisions cited by the Commission may address the same general subject matter covered by the Rules, a number of those statutory provisions cast substantial doubt on the lawfulness of at least some aspects of the Rules. For example, subsection (12) of § 393.140 RSMo specifically provides that the non-utility business activities of electric and gas utilities shall ***not*** be subject to the provisions of Chapter 393 or the regulatory authority of the Commission so long as such activities are kept substantially separate from their jurisdictional activities that are subject to regulation. As

discussed in greater detail in other portions of this brief, the Rules contain a number of provisions, particularly in the area of record-keeping and access to affiliate information, that would directly violate this statutory provision by requiring access to the records of an affiliate, which by virtue of its function or corporate structure, conducts activities that are substantially separate from the utility's jurisdictional business. In addition to the procedural and substantive flaws addressed herein, Appellant Trigen-Kansas City Energy Corporation also believes there are additional reasons why the Commission lacks authority to adopt 4 CSR 240-80.015. Such additional reasons are addressed separately herein.

To the extent § 386.250 and § 393.140 RSMo provide any authorization at all for the regulatory requirements set forth in the Rules, they clearly mandate that such requirements be imposed only after the Commission has conducted the type of adjudicatory hearing procedures designed to produce evidence.

For example, consistent with those provisions of the Rules which are allegedly designed to prohibit preferential conduct by utilities towards their affiliates, subsection (5) of § 393.140 RSMo authorizes the Commission to investigate whether the rates or practices of a utility are unjustly discriminatory or unduly preferential and, in the event it finds that they are, to order what "acts and regulations" should thereafter be observed by the utility. However, subsection (5), also provides that such action may only be taken by the Commission "after a hearing had upon its own motion or complaint" and then only where the Commission has determined that the existing rates, acts or practices of the utility are, in fact, unjustly discriminatory or unduly preferential. Subsection (8) of § 393.140 also

touches upon matters relating to some of the record-keeping requirements set forth in the Rules in that it empowers the Commission to "prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited." As with subsection (5), however, subsection (8) specifically provides that such action may only be taken by the Commission "after hearing."

Subsection (6) of § 386.250 RSMo is even more explicit about the procedural prerequisites that must be observed by the Commission before it may adopt the kind of regulatory requirements reflected in the Rules. Consistent with the various standards of conduct set forth in the Rules to govern how utilities should provide utility services in order to avoid any alleged preferential or discriminatory treatment, subsection (6) authorizes the Commission to adopt rules which "prescribe the conditions of rendering public utility service… " Subsection (6) also provides, however, that before such action may be taken by the Commission "…a hearing shall be held at which affected parties may present ***evidence*** as to the reasonableness of any proposed rule." (Emphasis supplied). To ensure that the evidentiary purposes served by such a hearing are actually fulfilled, subsection (6) goes on to underscore that any such rules promulgated by the Commission must be "supported by ***evidence*** as to reasonableness."

The meaning and significance of this statutory language to the issue of what kind of procedures the Commission was required to follow in promulgating the Rules could not be more clear. As Missouri courts have recognized, the term "evidence" means a "species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties

and through the medium of witnesses, records, documents, exhibits, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contentions." ***Rombach v. Rombach***, 867 S.W.2d 500, 503 (Mo. 1993) (quoting from the 1990 edition of *Black's Law Dictionary*). More importantly, though, evidence means "competent evidence heard under circumstances affording the adverse party, for the protection of his rights, those safeguards the law guarantees, including an opportunity for cross-examining the witnesses heard as well as the introduction of evidence in his own behalf." ***State ex rel. Kansas City Public Service Co. v. Waltner***, 169 S.W.2d 697, 703 (Mo. 1943). In ***Waltner, supra***, the statute under review required "legal and competent evidence." Given this requirement, this Court held that the use of affidavits was not sufficient to meet this test. ***Id.*** Appellants would submit that the Commission's exclusive reliance on pleadings and sworn statements in the rulemaking proceedings suffered was equally deficient.

Thus, the term "evidence," as commonly understood and used, is the product of an adjudicatory process and, by definition, can only exist in those circumstances where the procedural safeguards designed to test the competence and reliability of a party's contention or other species of proof have been followed.

That the General Assembly intended to require that any Commission rule relating to the conditions of providing utility service be supported by such evidence is further underscored by its use of the term "reasonableness" in subsection (6) of § 386.250 RSMo. For decades now, Missouri courts have recognized that the "reasonableness" of a

Commission action turns first and foremost on whether such action is "supported by competent and substantial evidence on the record." ***State ex rel Office of the Pub. Counsel v. Public Serv. Comm'n,*** 938 S.W.2d 339, 341 (Mo. App. 1997). Since such competent and substantial evidence can, by definition, only be produced under circumstances where cross-examination and the opportunity to present rebuttal evidence are provided, it is clear that the General Assembly intended the Commission to observe such procedures when promulgating rules relating to the conditions of providing utility service.

The use of the term "evidence" means that the General Assembly clearly contemplated an ***evidentiary type of hearing*** as opposed to the legislative type hearing which the Commission provided. An evidentiary hearing is one where "evidence" is produced, meaning it has the characteristics of a trial in that there must be sworn testimony, cross examination, the opportunity for rebuttal, and all of the other characteristics of adjudicatory proceedings familiar to the Court. As with the situation in ***Kansas City Public Service Co.***, ***supra***, sworn statements alone are insufficient to constitute "evidence."

These essential procedural attributes of an evidentiary hearing, and the need for administrative agencies such as the Commission to follow them where such a hearing is required, have also been recognized by the General Assembly in other statutory provisions applicable to the Commission. Pursuant to the contested case provisions found in Chapter 536 RSMo., an administrative agency must afford parties a variety of procedural rights in

those circumstances where a evidentiary hearing is required. These include (1) the right to receive notice; (2) the right to conduct discovery through the use of various discovery mechanisms; (3) the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses and to rebut opposing evidence; (4) the right to have all oral evidence received only on oath or affirmation; (5) the right to have a printed transcript of all proceedings; (6) the right to present oral arguments or written briefs at or after the hearing; (7) the right to have all portions of the record which are cited by the parties in the oral argument or briefs reviewed and considered by each official of the agency who renders or joins in rendering a final decision; and (8) the right to a final written decision accompanied by findings of fact and conclusions of law.

Although the Appellants believe that these contested case procedures were fully applicable to the proceedings conducted by the Commission in promulgating the Rules, the Appellants wish to emphasize that subsection (6) of § 386.250 and subsections (5) and (8) of §393.140 imposed an independent and agency-specific obligation on the Commission in the proceedings below to conduct an evidentiary hearing and provide the procedural safeguards normally associated with such a hearing. While the contested case procedures found in Chapter 536 may supplement and further codify the procedures that must be followed, they by no means constitute the only or even the primary source of the Commission's procedural obligations in promulgating the Rules at issue herein.

Under § 536.010 (2) RSMo, contested case procedures must be followed in any "proceeding before an agency in which legal rights, duties or privileges of specific parties

are required by law to be determined after hearing." Missouri courts have broadly interpreted the phrase "required by law" as encompassing any statute, ordinance or provision of the State or Federal Constitution that mandates a hearing. ***State ex rel. Yarber v. McHenry***, 915 S.W.2d 325, 328 (Mo. banc 1995). All of the elements of this statutory definition were fully satisfied in the proceedings below. The Commission is unquestionably an administrative agency under Missouri law. As a consequence, each of the docketed cases initiated by the Commission to promulgate the Rules clearly qualified as a "proceeding before an agency." It is equally clear that the Rules seek to determine the "legal rights, duties or privileges of specific parties." On their face, the Rules would impose extensive duties on the specific gas and steam heating utilities subject to the Commission's jurisdiction, ranging from the obligation to maintain certain records to the duty to train employees in the intricacies of the Rules' numerous requirements. The Rules also purport to redetermine, in numerous and substantial ways, the rights of these utilities to conduct their businesses and carry out transactions involving their affiliates by placing explicit limitations, conditions and requirements on how such rights may be exercised. These include, among others, Rule provisions requiring utilities to price their services to affiliates in a certain way, prohibitions against providing affiliates with certain information, and a panoply of other conditions and standards of conduct that are designed to control how utilities may exercise their lawful rights to conduct business. Indeed, the degree to which the Rules involve a determination of the duties and rights of *specific parties* is perhaps best illustrated by the fiscal notes which accompanied the Proposed Rules in the ***Missouri***

Register. The fiscal note for the steam heating rule indicates there are three steam heating utilities in the state. (L.F. 491) The fiscal notes for the two gas rules indicates there are 13 gas companies. (L.F. 682, 1011) As shown therein, the Commission was able to specifically identify and notify all of the individual utilities whose rights and duties would be affected by the Proposed Rules. Moreover, the Commission in the fiscal notes was even able to provide a dollar estimate of how the various duties imposed by the Proposed Rules would affect each of these parties. (L.F. 491, 682, 1011) Under such circumstances, there can no doubt that the Rules were always intended to determine the legal rights and duties of specific parties and that they would, in fact, do so if upheld by this Court.

For the reasons discussed above, it is clear that the rights, duties and privileges addressed by the Rules are "required by law to be determined after hearing" since the statutes clearly require hearings at which evidence would be required.

Finally, another hallmark of a contested case is that the proceeding in question be "adversarial in nature." ***Conlon Group, Inc. v. City of St. Louis***, 944 S.W.2d 954, 957 (Mo. App. W.D. 1997). The record in the proceedings below shows that virtually every aspect of the Rules ultimately adopted by the Commission, including whether they were needed, whether they would serve their intended purpose, whether and to what extent they were lawful, and whether they would promote or damage the public interest, were hotly contested by the Commission Staff and the Office of the Public Counsel on the one hand and the regulated utilities on the other. Under such circumstances, it is simply not possible to conclude that these proceedings were anything but "adversarial in nature."

Commission Failure to Follow Statutory Procedures

Although Appellants and others filed motions specifically requesting that the Commission observe all of these type procedures, and the Commission did observe *some* of them (i.e., it provided notice of the proceedings through the notice of proposed rulemaking; it allowed discovery to be utilized and even *compelled* some discovery; it provided for the receipt of oral testimony under oath or affirmation; and it provided a printed transcript) the Commission failed and refused to employ the most critical aspects of these procedures. Specifically, the Commission did not afford Appellants the right to cross-examine opposing witnesses or rebut the evidence of opposing parties. (Tr. 3) Instead, the questioning of witnesses was limited to questions from the Regulatory Law Judge and the Commissioners themselves. (Tr. Vol. 1, p. 2 line 13 through p. 5, line 4; Tr, Vol. 3, p. 2 line 22 through p. 5, line 21) Nor did the Commission permit the Appellants to present oral arguments or written briefs upon conclusion of the "public hearings" held in these cases. The Commission's refusal to observe these fundamental and statutorily mandated procedures is even more inexplicable in light of the Commission's decision to observe other *selected* procedural requirements of a contested case, such as the right to conduct discovery and the requirement that testimony at the hearings be provided under oath. The Commission actually had to resolve various discovery disputes between specific parties. (See, e.g., L.F. 188-196; 1096-1103; 1104-1109 which are motions to compel answers to discovery and responses, and L.F. 434-442 which is a Commission order compelling such discovery.) At no time did the Commission explain how its practice of

picking and choosing which contested case procedures it would observe, while simultaneously rejecting others, could be reconciled with the statutory provisions governing the subject matter of these rulemakings and contested case procedures.

It is unclear whether the Commissioners reviewed the pertinent portions of the comments in rendering their final decision.

The Commission's refusal to permit oral argument or briefs upon conclusion of the public hearings held in the cases below also constituted a significant denial of due process rights. The only pleadings provided for in the cases below that were in any way comparable to a brief or the summary that might be provided in an oral argument were the comments and reply comments that parties were permitted to file within thirty and sixty days, respectively, of the issuance of the Rules. Unlike briefs or oral argument, however, these comments were required to be submitted in advance of the public hearings. As a result, Appellants had no opportunity upon conclusion of those hearings to present arguments to the Commission concerning how the issues raised by its Proposed Rules were affected by the matters divulged at such hearings.

As a result of the Commission's refusal to observe these critical procedural requirements, the Appellants were completely deprived of their statutory due process rights to test, through cross-examination, the validity, accuracy and relevance of the written and oral assertions made by the proponents of the Rules. The Appellants were also deprived of their right to utilize cross-examination in an effort to impeach the statements that were orally given by such proponents at the public hearings held in these cases, to question the

qualifications and competence of such proponents to address the matters covered by their statements, or to otherwise challenge the merits of such statements. In short, the Appellants were deprived of a most fundamental procedural safeguard provided by law to ensure that rules promulgated by the Commission are, in fact, "supported by evidence as to reasonableness" as required by § 386.250(6) RSMo.. Given the Commission's refusal to afford parties the opportunity to test the validity of the assertions through cross-examination, there is simply no way that a reviewing court can conclude this statutory procedural requirement for promulgating the Rules was satisfied in the proceedings below.

The Commission's refusal to afford Appellants the opportunity to exercise these fundamental procedural rights is particularly arbitrary and capricious since the Commission could have afforded these rights without in any way delaying its promulgation of the Rules. It would have been a simple enough matter for the Commission to permit cross-examination during the public hearings that were held in the proceedings below, to allow the introduction of evidence rebutting the contentions of opposing parties, and to afford all participants the opportunity to present oral argument or briefs upon the conclusion of the public hearings. In this way, the general statutory rulemaking procedures could have been fully harmonized with the Commission's separate and explicit statutory obligations to afford an evidentiary hearing under § 386.250(6) and §393.140 (5) and (8) RSMo.

Indeed, the need for an administrative agency to harmonize general rulemaking procedures with the specific statutory procedures that have been established to govern its particular exercise of regulatory power is not an unusual occurrence under Missouri law.

As summarized in 20 ***Missouri Practice Series, Administrative Practice and Procedure,*** §6.39, Missouri statutes are rife with examples of where the General Assembly has specifically altered, supplemented or otherwise refined the notice, hearing or other procedures it directs a particular agency to follow when promulgating rules. ***Id***. at 151-154. Rather than attempt to harmonize the general and agency-specific procedural requirements that govern its exercise of power, the Commission chose instead to pursue the rulemakings in a way that rendered these explicit statutory hearing and evidentiary requirements, and their specific procedural due process protections, a complete and utter nullity.

In view of the foregoing, it is clear that the procedures adopted by the Commission in promulgating the Rules in the cases under review here were inadequate and wholly deficient under relevant Missouri law. The Court should accordingly find that the Rules have been unlawfully promulgated due to the Commission's failure to observe the underlying statutory procedural requirements.

Point II.

The Public Service Commission Erred in its Orders of Rulemaking Because Although it Was Required by § 536.021.2 and § 536.021.6(4) RSMo To Publish the Reasons Why The Proposed Rules Were Necessary and to Publish a Concise Summary of the Agency's Findings With Respect to the Merits of Testimony or Comments Opposed to the Proposed Rules, it Did Not Do So, and Therefore, The

Decision Is Subject to Appellate Review Pursuant to § 386.540.1 RSMo, in That the Commission Committed an Error of Law When It Failed to Comply With the Requirements of § 536.021.2 and § 536.021.6(4) RSMo.

The scope of review was discussed under Point I. It is incorporated here by reference.

The Commission acted unlawfully in adopting the Rules because the procedure followed by the Commission violated § 536.021 RSMo. The Commission failed to comply with subsections 2 and 6(4) thereof.

Section 536.021.2(1) RSMo requires that a notice of proposed rulemaking contain "an explanation of any proposed rule or any change in an existing rule, **and the reasons therefor**"(emphasis added). The Commission has dealt with affiliate cross-subsidization situations in the past through the process of setting rates for regulated services by including only those costs which it deems reasonable. ***State ex rel. General Telephone Co. of the Midwest v. PSC***, 537 S.W.2d 655 (Mo.App. 1976). It has not lost the authority to continue to do that. Therefore, there was no reason for the Commission to implement these various new requirements by rule when it already possessed authority to prevent cross-subsidization through its plenary power to establish public utility rates. In that context, the Proposed Rules failed to contain any reasons why the Proposed Rules were necessary.

Section 536.021.6(4) RSMo requires an order of rulemaking to contain:

> A brief summary of the general nature and extent of comments submitted in support of or in opposition to the proposed rule and **a concise summary of the testimony presented at the hearing**, if any, held in connection with said rulemaking, together with **a concise summary of the state agency's findings** with respect to the merits of any such testimony or comments which are opposed in whole or in part to the proposed rule.

(emphasis added). The foregoing are lacking from the Orders of Rulemaking. In fact, no "findings" or summary of "findings" appear in the Orders of Rulemaking.

To the extent that the Commission claims any findings of fact or conclusions of law appear in the Orders, it fails to set them forth adequately as required by law and Appellants are unable to discern the actual basis for the Orders and Rules in general and the Orders and Rules are therefore unlawful and unreasonable as a matter of law. Furthermore, to the extent that the Commission claims any findings of fact or conclusions of law appear in the Orders, by definition such are not supported by competent and substantial evidence upon the whole record due to the Commission's failure to follow proper legal procedure in adopting the Rules as discussed elsewhere in this brief.

For these reasons, the resulting Rules are therefore "null, void and unenforceable" pursuant to 536.021.7 RSMo.

Point III.

The Public Service Commission Erred in its Orders of Rulemaking Because Although it Was Required by § 536.016 RSMo Propose Rules Based Upon Substantial Evidence on the Record and a Finding that the Rule Is Necessary to Carry Out the Purposes of the Statute That Granted It Rulemaking Authority, It Did Not Do So, and Therefore, The Decision Is Subject to Appellate Review Pursuant to § 386.540.1 RSMo, in That The Commission Committed an Error of Law When It Violated § 536.016 RSMo.

The scope of review was discussed under Point I. It is incorporated here by reference.

The Commission acted unlawfully in adopting the Rules because it did not comply with the provisions of § 536.016 RSMo. This provision of law became effective on August 28, 1999. It provides that:

> 1. Any state agency shall propose rules based upon ***substantial evidence on the record*** and a finding by the agency that the rule is necessary to carry out the purposes of the statute that granted such rulemaking authority.
>
> 2. Each state agency shall adopt procedures by which it will determine whether a rule is necessary to carry out the purposes of the statute authorizing the rule. Such criteria and rulemaking shall be based upon reasonably available empirical data and shall include an assessment of the

effectiveness and cost of the rules both to the state and to any private or public person or entity affected by such rules.

(Emphasis supplied.)

As pointed out previously, since the Commission did not utilize the special statutory procedures applicable to it to establish an evidentiary record in its consideration of the Proposed Rules, by definition its procedure cannot satisfy this explicit statutory requirement that the rules be *based on substantial evidence on the record*.

This statute became effective while the Commission was conducting its rulemaking and before the issuance of the Orders. It was in effect at the time the Commission conducted the so-called "hearings" on the Proposed Rules in mid-September 1999. The Commission therefore could have complied with this statutory requirement but failed to do so.

The Commission was required to comply with this new statute immediately upon it becoming effective because it is a procedural statute. See ***State v. Thomaston***, 726 S.W.2d 448 (Mo.App.W.D. 1987). A procedural statute will operate or will be applied retrospectively unless a contrary intent appears from the legislation. ***Id.*** at 460. The provisions of § 536.016 RSMo are procedural in nature, and thus are also retroactive in this situation. The provision relates to the *procedure* to be followed by all agencies in making rules. Clearly then, § 536.016 RSMo applied to this situation. The Commission was required to comply with the provisions of the new statute from and after its effective date. "If, before final decision, a new law as to procedure is enacted and goes into effect, it

must from that time govern and regulate the proceedings." ***Id.*** at 462. Thus, while §536.016 may not apply to actions in the rulemaking cases *prior* to its effective date, it "must from that time [forward] govern and regulate the proceedings." ***Thomaston***, at 462, citing ***Clark v. Kansas City, St. L. & C. R.Co.***, 219 Mo. 524, 118 S.W.40, 43 (1909).

The new section became effective August 28, 1999. Thus, it had already been in effect for several weeks at the time of the so-called "hearings" in mid-September 1999. Simply put, since the new statute was in effect at the time of the "hearings," the Commission *could have complied,* and *was required to* comply, with this new procedural statute in the conduct of the hearings. The new statute mandates "substantial evidence on the record" for all agencies in rulemakings. This recent expression of intent by the General Assembly for something more than a legislative-type hearing for *all* state agencies clearly supports the position of Appellants regarding the requirement for contested case type procedures due to the *specific* statutes applying to the Commission governing the subject matter of these Rules.

The new statute also mandates a finding that the particular rule is necessary to carry out the purpose of the statute that granted the rulemaking authority. The Commission failed to do that, and thus violated the statute. If the Commission had complied with that provision, and told the world the nature of its specific rulemaking authority in these proceedings, it might not have been necessary to engage in the previous discussion as to what specific statutory authority provisions apply here. Indeed, as discussed more fully

below, no such finding was possible by the Commission because no showing of need for the Proposed Rules was ever made.

For the Commission's failure to comply with these statutory requirements, the Court should find the rules void.

Point IV.

The Public Service Commission Erred in its Orders of Rulemaking Because Although it Was Required by § 393.140(5) RSMo To Hold a Hearing and Determine Whether A Utility's Existing Methods or Practices are Unjustly Discriminatory or Unduly Preferential Before Prescribing New Requirements, It Did Not Do So, and Therefore, The Decision Is Subject to Appellate Review Pursuant to § 386.540.1 RSMo, in That The Commission Committed an Error of Law When It Violated § 393.140(5) RSMo.

The scope of review was discussed under Point I. It is incorporated here by reference.

Section 393.140(5) RSMo gives the Commission authority to prescribe new requirements to govern a utility's conduct if the Commission *first* determines, *after* hearing, that the utility's existing methods or practices are "unjustly discriminatory or unduly preferential." The statutory language reads as follows:

> (5) ... Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the ... acts of ... such ... corporations are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the commission shall determine ... the just and reasonable acts and regulations to be done and observed ... .

No such hearing was held and no such opinions were expressed by the Commission in any of the rulemaking proceedings under review here. There was not one instance cited by the Commission where it determined that a particular act of any corporation under its jurisdiction was unjust, unreasonable, unjustly discriminatory, or unduly preferential "or in any wise in violation of any provision of law" and that such conduct would be corrected by the Rules. That statute clearly contemplates that the Commission must make a finding of some violation after a hearing, and only then can it determine the "just and reasonable ... regulations" thereafter to be observed. The Commission did not abide by this statutory requirement in this instance.

Further, because of the lack of procedural due process described in Point I above, no such finding could have been made because the "hearing" that was provided was unlawfully conducted, and the Court should rule that the Rules are void.

Point V.

The Public Service Commission Erred in its Orders of Rulemaking Because the Rules are Beyond the Subject Matter Jurisdiction of the Commission, and Therefore, the Commission's Decision to Adopt the Rules is Subject to Appellate Review Pursuant to § 386.540.1 RSMo, In That the Rules Conflict With § 386.030 RSMo and § 393.140(12) RSMo Because They Purport to Bring Unregulated Business Activities Under the Jurisdiction of the Commission and Indirectly Impose Record-keeping Requirements on Unregulated Entities.

The scope of review was discussed under Point I. It is incorporated here by reference.

The Rules purport to govern activities of "affiliates" of gas and heating corporations and activities related to their "affiliates." The General Assembly has never given explicit authority to the Commission to adopt the type of rules under review here. The Rules are therefore beyond the subject matter jurisdiction of the Commission. The General Assembly has already preempted the Commission with regard to establishing administrative rules in this regard.

Subsection 12 of § 393.140 RSMo provides, in part, that if a utility engaged in carrying on any business "other than owning, operating, or managing" a utility plant, "which business is not otherwise subject to the jurisdiction of the Commission, and is so

conducted that its operations are to be substantially kept separate" from owning, operating, managing or controlling of such utility plant, that corporation, in respect to the other unregulated business, ***shall not be subject*** to any provisions of the Public Service Commission law.

The Rules violate that statute because they purport to bring the *unregulated* business under the jurisdiction of the Commission. For example, they require a utility to "ensure" that *affiliates keep their records* in a certain way and require the utility to "make available" the records of the unregulated affiliates. ***See***, 4 CSR 240-40.015(5) and (6); 4 CSR 240-80.015(5) and (6). Thus, the Commission is using its jurisdiction over the regulated utility to force the *unregulated* affiliate corporation to keep its separate books and records in a manner deemed suitable by the Commission. This clearly violates the statutory mandate that the ***unregulated*** business ***shall not*** be subject to any provisions of the Public Service Commission law. *See*, § 393.140.12 RSMo.

The General Assembly did not give the Commission the power to adopt rules governing how the utility is to keep information on *unregulated* matters, or how the unregulated operations are to keep their records, or any of the other activities that the Commission is reaching out to regulate in the Rules. Subsection 12 of § 393.140 RSMo contains language which says the Commission's powers to inquire into and prescribe the apportionment of the *regulated* operations are not restricted by the provision that the unregulated businesses are not subject to the Commission's jurisdiction. But by that

caveat, the General Assembly simply kept in place the Commission's powers to "inquire" about those things.

The Commission has indicated that it is concerned about the possibility of a regulated utility subsidizing unregulated operations. The Commission has adequately dealt with such situations in the past through the process of setting rates for regulated services by including only those costs which it deems to be reasonable. The Commission is not required to accept, without question, any price which a utility might see fit to pay for various items of property. ***State ex rel. General Telephone Co. of the Midwest v. PSC***, 537 S.W.2d 655 (Mo.App. 1976).

If the General Assembly were under the belief that the Commission had suddenly become unable, within the present statutory framework, to perform its job adequately with regard to unregulated operations, it would have amended the section to extend the Commission's subject matter jurisdiction. The General Assembly has not done so. Section 393.140 RSMo has not been amended since 1967. Instead, the Commission has suddenly sought, on its own volition, and in the absence of any statutory mandate from the General Assembly, to extend its quasi-legislative reach into areas where it has no such authority. The Commission is a creature of statute, and as such, cannot exceed its jurisdiction through the creation of a rule which is not grounded in statutory authority. ***State ex re. Kansas City Transit, Inc. v. PSC***, 406 S.W.2d 5 (Mo. 1966). The Commission may honestly believe it needs such authority, but neither convenience, expediency, nor necessity are proper matters for consideration in determining whether an act of the

Commission is statutorily authorized. ***State ex rel. Utility Consumers Council of Missouri, Inc. v. PSC***, 585 S.W.2d 41 (Mo. 1979). The Commission cannot point to any explicit authority to adopt these Rules.

The Commission unquestionably has statutory authority to set the price of gas service or steam service provided by regulated corporations in Missouri, and to prescribe the terms and conditions under which such regulated services are to be sold to the customers of the regulated corporation in Missouri. In these Rules, however, the Commission has greatly exceeded the scope of its subject matter jurisdiction by attempting to control the price of *non-regulated* transactions. The Commission is an administrative agency with limited jurisdiction and the lawfulness of its actions depends entirely on whether it has statutory power and authority to act. Where that authority is lacking, a reviewing court may reverse the decision of the Commission. ***State ex rel. Gulf Transport Co. v. PSC***, 658 S.W.2d 448 (Mo.App. 1983).

There are numerous situations presented by the Rules where the Commission is acting beyond its jurisdiction.

! For example, the asymmetrical pricing standard in 4 CSR 240-40.015(2)(A), 4 CSR 240-40.016(3)(A), and 4 CSR 240-80.015(2)(A) which governs the transfer of assets or services between a gas or steam heating utility and its affiliate, or between the regulated and unregulated operations of a single utility, requires such transaction to be priced at either *market value* or *fully distributed cost*, depending upon

which approach is *least favorable* to the utility. That is not a transaction between the utility and its customer for the service of gas or steam, which is subject to the jurisdiction of the Commission. That is a transaction between the utility and a supplier of goods or services to the utility itself -- much like an individual buying some product from Wal-Mart. The Commission does not have the authority to dictate the manner in which a utility shall conduct its business or take over the general management of the utility. See, ***State ex rel. Laclede Gas Company v. PSC***, 600 S.W.2d 222 (Mo.App. 1980), appeal dismissed, 101 S.Ct. 848; ***State ex rel. Kansas City Transit, Inc. v. PSC***, 406 S.W.2d 5 (Mo. 1966).

Not only is this asymmetrical pricing approach adopted by the Commission fundamentally unfair and unreasonable, it is beyond the scope of authority of the Commission. Nowhere in the statutes cited as authority for the Rules is the Commission given authority to mandate the pricing formula at which a utility transfers *non-jurisdictional goods or services*. Yet that is *exactly* what the Commission is doing with these Rules. This pricing method also conflicts with the pricing method in § 386.756 RSMo Supp. 1999, established by the General Assembly for similar types of transactions.

! Another example of this extra-jurisdictional conduct by the Commission can be found in 4 CSR 240-40.016(2)(F), (G) and (N), 4 CSR 240-40.015(2)(C), and 4 CSR 240-80.015(2)(C) which concern the provision of "information" by gas and heating corporations. The Commission has cited no statutory authority by which it can control and dictate the use of "information" in the possession of a gas corporation, yet each of these

provisions places restrictions on how a gas corporation may utilize "information" in its possession.

! Another example can be found in 4 CSR 240-40.016(2)(I) and (J) which purport to prohibit, or impose conditions on, a gas corporation making agreements regarding off-system commodity sales and interstate pipeline capacity releases. The Commission has no subject matter jurisdiction over such transactions. The Commission has no jurisdiction over matters involving interstate commerce. ***See*** § 386.030 RSMo.

! Another example is 4 CSR 240-40.016(2)(M) where the Commission purports to require a gas corporation to maintain records regarding marketing activities of *another* corporation or entity. Nowhere in the statutes is the Commission given authority to require a gas corporation to keep records of events solely pertaining to other entities.

! Another example can be found in sections (5) and (6) of 4 CSR 240-40.015, sections (6) and (7) of 4 CSR 240-40.016, and sections (5) and (6) of 4 CSR 240-80.015. These are unreasonable and unlawful, an abuse of discretion and in excess of the jurisdiction of the Commission because they require a gas corporation and a steam heating company to "ensure" that its affiliates keep their records in a certain way and require the gas corporation or steam heating company to "make available" the records of the affiliates. These provisions thus purport to impose indirect controls and conditions on entities over which the Commission has no subject matter jurisdiction. Natural gas utilities in Missouri and elsewhere may release the interstate pipeline capacity they hold pursuant to rules established by the Federal Energy Regulatory Commission (FERC) and the tariff

requirements of the interstate pipelines that own such capacity. *See,* FERC Stats. and Regs., CCH ¶ 24,848; 18 CFR § 284.8. Similarly, they may make opportunity sales to off-system customers located in other states pursuant to a blanket certificate that was issued by FERC in FERC Order No. 636. *See,* FERC Stats. and Regs., CCH ¶ 24,979; 18 CFR § 284.402. The Commission's attempt to regulate such transactions is expressly precluded by § 386.030, which states that the Public Service Commission law shall not apply, or be construed to apply, to interstate commerce absent a specific provision in that law to the contrary. No such provision exists.

Further, the controls and conditions sought to be imposed by the Rules on those other entities may be impossible to achieve or enforce given the unreasonably broad definitions of "affiliated entity" and "control" in the Rules.

The Rules violate that provision by compelling the utility to force the unregulated operations to keep their books in a manner suitable to the Commission. Therefore, the Rules should be held to be void because they conflict with and exceed the scope of existing law which says the unregulated operations shall not be subject to the Commission's jurisdiction.

Point VI.

The Public Service Commission Erred in its Orders of Rulemaking Because the Rules Contain Impermissibly Vague, Ambiguous and Inconsistent Provisions, and Therefore, the

Commission's Decision to Adopt the Rules is Subject to Appellate Review Pursuant to § 386.540.1 RSMo, In That the Commission Has Committed an Error of Law By Violating Constitutional Provisions Relating to Due Process.

The scope of review was discussed under Point I. It is incorporated here by reference.

Due process, as guaranteed by Article I, § 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, requires that a penal statute[4] be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. ***Verbeck v. Schnicker***, 660 F.2d 1260, (8th Cir. 1981) *cert. den*. 455 U.S. 921, 102 S.Ct. 1278, 71 L.Ed. 2d 462. Vagueness, as a due process violation, takes two forms. One is the lack of notice to a potential offender because the statute is so unclear that "men of common intelligence must necessarily guess at its meaning." ***Connally v. General Construction Co.***, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 332 (1926); ***Broadrick v. Oklahoma***, 413 U.S. 601, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973). The second is that the vagueness doctrine assures that guidance, through explicit standards, will be afforded to those who must apply the statute, avoiding

[4] These Rules have the force and effect of law, and the Commission can seek the imposition of civil penalties for violations of the Rules. § 386.570 RSMo.

possible arbitrary and discriminatory application. ***Grayned v. City of Rockford***, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

Where a provision is open to a wide range of meanings and interpretations, Missouri courts have found them to be constitutionally infirm. ***State v. Young***, 695 S.W.2d 882 (Mo. banc 1985). In ***City of Festus v. Werner***, 656 S.W.2d 286 (Mo. App. E.D. 1983), the court struck down a city ordinance which contained a prohibition on "disagreeable" odors. No definition or objective standard existed for the term "disagreeable." Appellants will point out numerous instances of the same type of "legislation by conclusion" in the Rules where the Commission has employed impermissibly vague terms or phrases as a standard of conduct which the utility must meet.

! An example of this type of impossible standard is found in 4 CSR 240-40.016(1)(K), 4 CSR 240-40.015(1)(H), and 4 CSR 240-80.015(1)(H) where "preferential service" is defined to mean "information, treatment or actions by the regulated gas corporation [or heating corporation] which places the affiliated entity at an *unfair advantage* over its competitors." The use of the phrase "unfair advantage" is a totally subjective test and an unconstitutionally impermissible standard because of its vagueness. The Commission attempts to further define "unfair advantage" in 4 CSR 240-40.016(1)(P), 4 CSR 240-40.015(1)(J) and 4 CSR 240-80.015(1)(J) but those definitions suffer from the same flaw in that they each rely upon the completely subjective term "competitively prohibitive cost."

! Another example of vagueness is section (9) of 4 CSR 240-40.015, and section (9) of 4 CSR 240-80.015 which require a gas corporation and a heating company, respectfully, to train and advise its personnel "as appropriate" to ensure compliance with the Rules.

! Another example of vagueness is multiple references to a Cost Allocation Manual ("CAM") in the Rules without an indication of how this CAM is to be filed for Commission approval, exactly what it is to contain, or what effect approval of the CAM will have.

! Another example of vagueness is found in 4 CSR 240-40.016(1)(B) where "affiliate transaction" is defined to include not only "transactions" between gas corporations and their legally separate corporate affiliates but also to "transactions" between the regulated utility and the "unregulated business operations" of the same utility. Nowhere does the rule provide any guidance on what constitutes an "unregulated business operation," on what constitutes a "transaction" for purposes of such definition, or on how a transaction can take place within or between a single corporate entity.

! One example of inconsistent provisions relates to the prescribed treatment of transportation information found in 4 CSR 240-40.016(2)(F), and 4 CSR 240-40.016(2)(G) and 4 CSR 240-40.016(3)(C). The first provision precludes the gas corporation from providing to either affiliated or non-affiliated marketers "any information" it receives through the provision of transportation. The second provision contemplates that gas corporations may make certain information related to transportation

available to an affiliate and affirmatively requires that such information also be made contemporaneously available to all non-affiliated marketers on the gas corporation's distribution system. The third provision also permits and even requires certain information to be provided to affiliates or non-affiliates, or both, without regard to whether such information is transportation related. It is obviously impossible to comply with all of these conflicting requirements.

The Commission may argue that the Court should ignore all of these constitutional infirmities because no enforcement actions have been yet commenced by the Commission. These Appellants respectfully point out that they were required by state law to raise these concerns in their application for rehearing before the Commission. See, § 386.500.2 RSMo. An applicant for rehearing is required to "set forth specifically the ground or grounds on which the applicant considers said order or decision to be unlawful, unjust or reasonable." *Id.* The statute also specifies the penalty if the Appellants did not comply: "The applicant shall not in any court urge or rely on any ground not so set forth in the application for rehearing." Section 386.500.2. RSMo.

Therefore, it is clear the Appellants were compelled to raise any issues -- including constitutional issues -- which cause the Rules to be "unlawful." If the Appellants had not done so, they would have been prohibited from making these arguments in this Court on review, and perhaps also in a later enforcement proceeding. The special statutory review requirements pertaining to the Commission indicate that the General Assembly wanted a court on review to consider all aspects of the Commission's action. The Court's statutory

duty is to review the Commission's action to determine if it is "lawful" and "reasonable." § 386.510 RSMo. The Commission's use of inconsistent provisions and terms which are unconstitutionally vague are items which make the Commission's action unlawful and thus come within the scope of review.

An argument to defer examination of these constitutional infirmities to an enforcement proceeding is essentially one of "ripeness." The ripeness doctrine is invoked to determine whether a dispute has matured to a point that warrants decision. It turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." "In determining whether the issues are fit for consideration, courts look at numerous factors, including the adverseness of the parties, whether the legal issues would be affected by further factual development, judicial efficiency, finality, and the likelihood that the asserted injury or anticipated events will occur." ***McDonald's Corp. v. Nelson***, 822 F. Supp. 597 at 604, *aff'd sub nom.* ***Holiday Inn Franchising, Inc. v. Branstad***, 29 F.3d 383 (8th Cir. 1994), *cert. denied* 513 U.S. 1032 (1994). The test is imprecise and the decision made on a case by case basis. ***Marine Equipment Mgt. Co. v. United States***, 4 F. 3d 643, 646 (8th Cir. 1993).

In ***McDonald's***, food service and hotel franchisers filed actions seeking a declaratory judgment that provisions of the Iowa Franchise Act violated the contract clauses of the federal and state constitutions as applied to franchise agreements existing at the time the legislation was enacted. The court noted that the plaintiffs were likely to make

business judgments that were in conflict with the provisions of the Iowa Act, thus forcing them to break the laws in order to challenge them. Although the parties could await a situation where the provisions of existing franchise contracts and the provisions of the statutes came clearly into conflict, the court said it "will be in no better position later than now to decide the question of whether the [statutes'] provisions unconstitutionally impair plaintiffs' contract rights." ***McDonald's***, 822 F.Supp. at 605.

Similarly, the unlawful actions of the Commission are present for review here. Appellants have pointed with specificity to the infirm provisions in the Rules. If not addressed by the Court, Appellants would then be forced to break the Rules in order to challenge them. All of the factors indicate the Court should rule now. The Court should strike down these Rules as violations of due process because of the unreasonably vague provisions.

Point VII.

The Public Service Commission Erred in its Order of Rulemaking Regarding 4 CSR 240-80.015 Because the Statutory Authority Cited by the Commission for the Proposed Rule Does Not Authorize the Adoption of the Rule, and Therefore, the Commission's Decision to Adopt that Rule is Subject to Appellate Review Pursuant to § 386.540.1 RSMo, In That the Commission Has Committed an Error of Law By Acting Beyond Its Statutory Authority in Promulgating the

Rule and Its Failure to Cite Appropriate Statutory Authority Renders the Rulemaking Void Pursuant to § 536.021.7 RSMo.

The scope of review was discussed under Point I. It is incorporated here by reference. This point discusses aspects of the case which are unique to the steam heating rule.

4 CSR 240-80.015 purports to govern activities of "affiliates" of a heating company and the activities of a heating company related to its "affiliates." In addition to it being unlawful for the reasons stated previously in regard to all of the Rules, there are additional reasons why this particular Rule ("the Rule") is unlawful.

The legal "authority" for the Rule cited by the Commission (L.F. 483) – §§386.250 RSMo Supp. 1998 and 393.140 RSMo 1994 – does not authorize adoption of the Rule. First, it should be noted that since neither § 386.250 RSMo nor §393.140 refer to heating companies, neither can be a basis for Commission authority to adopt a rule governing steam heating companies.

The Commission's entire jurisdiction over heating companies is by virtue of §393.290 RSMo. That section, however, was not cited by the Commission as "legal authority" for the proposed rule on heating companies as required by § 536.021.2(2) RSMo. Without the authority of § 393.290 RSMo, there is simply no authority whatsoever for the Rule in relation to heating companies. Because the Commission failed to cite any authority to adopt a rule relating to heating companies in its notice of proposed rulemaking,

the Rule is void pursuant to § 536.021.7 RSMo, which provides that unless a rule is made in accordance with § 536.021, it "shall be null, void and unenforceable."

Second, neither section cited by the Commission as "legal authority" gives the Commission the authority to adopt, for any type of utility, an "affiliate transactions" rule such as the broad, wide-ranging rule that is reflected in 4 CSR 240-80.015. The only explicit rulemaking authority granted in § 393.140 RSMo appears in subsection (11) of that statute. Under §393.140(11), the Commission's rulemaking authority is restricted to the implementation of that subsection, which deals with utility rate schedules, not affiliate transactions. The Commission cannot convincingly argue that § 393.140 RSMo grants it *implied* rulemaking authority, because had the General Assembly believed § 393.140 contained a broad grant of implied rulemaking authority, there would have been no need for the specific grant of rulemaking authority in subsection (11) which is restricted to utility rate schedules. Further, by specifically granting the Commission rulemaking authority regarding the implementation of subsection (11), under the doctrine of *expressio unius est exclusio alterius,* any other Commission rulemaking authority was excluded under § 393.140 RSMo.

In regard to the rulemaking authority granted to the Commission under § 386.250 RSMo, as discussed elsewhere in this brief, the Commission flatly failed to follow the procedural requirements required by that statute in adopting 4 CSR 240-80.015 because it failed to hold an evidentiary hearing. That statute therefore cannot constitute legal authority for adoption of 4 CSR 240-80.015. Moreover, to the extent the Rule purports to

cover matters other than prescribing the "conditions of rendering public utility service" (i.e., it purports to cover the activities of "affiliates" of a heating company and transactions between a heating company and its "affiliates"), § 386.250 RSMo cannot possibly constitute authority for the Rule. To the contrary, by purporting to address such matters, the Rule violates § 393.140(12) RSMo which precludes Commission jurisdiction over unregulated business activity engaged in by a utility.

The Commission's failure to cite proper legal authority for 4 CSR 240-80.015 as required by law means the Rule is "null, void and unenforceable" as a matter of law pursuant to § 536.021.7 RSMo and the Court should so rule.

Point VIII.

The Missouri Court of Appeals, Western District, Erred in Determining That it Lacked Jurisdiction to Consider the Merits of the Case Because the General Assembly Intends for All Orders or Decisions of the Commission, Including Orders of Rulemaking, to Be Subject to Review by the Courts in the Exclusive Manner Prescribed in Sections 386.500 and 386.510 RSMo, and Has Exhibited No Intention of Legislatively Overruling This Court's Decision in *Union Electric Company v. Clark*, 511 S.W.2d 822 (Mo. 1974), In That The Most Recent Expression of Legislative Intent in § 386.515 RSMo Supp. 2001 Shows

A Clear Directive That The Procedure in § 386.510 Is Exclusive; The Western District Erroneously Ascribes an Intent to the General Assembly Which Is Unsupported and Cannot Be Reconciled With Other Provisions of the Public Service Commission Law; The Western District's Opinion Relies Upon Incorrectly Construing General Statutes as Controlling Over Specific Provisions; and The Western District's Opinion Renders Meaningless the Jurisdictional Provisions in Supreme Court Rule 100.01 and § 536.100 RSMo.

Scope of Review

The scope of review of decisions of the Commission was discussed under Point I. This Point is presented solely due to the content of the Opinion of the Western District in this case prior to transfer. This Point concerns the jurisdiction of the state's courts to review orders and decisions of the Commission.

The Western District's Opinion dismissed the case due to a perceived lack of jurisdiction, holding that the Appellants "were required to file a declaratory judgment action pursuant to § 536.050." (Slip Opn., p. 23) Missouri courts have held that although the decision to dismiss for lack of subject matter jurisdiction is in some instances a question of fact left to the sound discretion of the trial judge, a different approach is necessary when there is no dispute concerning the facts. When the facts regarding jurisdiction are uncontested, as here, a question as to subject matter jurisdiction is purely a

question of law and is reviewed *de novo.* ***B.C. National Banks v. Potts,*** 30 S.W.3rd 220, 221 (Mo.App. W.D. 2000).

The Western District interpreted the statutes applicable to the Commission in a different manner than any other court in this state, including the state's highest court, has ever done. Statutory interpretation is a question of law, which a court reviews *de novo*. ***Delta Air Lines, Inc. v. Director of Revenue***, 908 S.W.2d 353, 355 (Mo. banc 1995). Therefore, the Supreme Court can review the question of jurisdiction raised by the Western District *de novo*.

Discussion

The point of this discussion is that the Western District was incorrect in its attempt at statutory interpretation in the case below, and incorrect in attempting to essentially overrule ***Union Electric Co. v. Clark***, 511 S.W.2d 822 (Mo. 1974), which held that a declaratory judgment action could not be brought to challenge a rule of the Commission. Thus, the issue is whether this Court's holding in ***Clark*** will continue to be the law.

Instead of ruling on the merits (as discussed in the previous Points Relied On), the Western District, *sua sponte*, reached back in time to various periods such as 1913, 1945, 1975 and 1977 to fabricate an alleged legislative intent which has never been articulated or recognized by any appellate court in this state. Essentially, the Western District says that despite what this Court held in ***Clark*** in 1974, the General Assembly really intended to

make rules of the PSC subject to challenge by declaratory judgment with the passage of the Administrative Procedure Act in 1945. This is a novel theory. The Opinion directly conflicts with the procedure uniformly followed since 1913 for judicial review of decisions of the Commission. The Opinion takes what was until now a known and settled process for judicial review of all final decisions of the Commission -- a process mandated by the General Assembly -- and holds there are multiple avenues. No argument by any party advocated this novel theory, and no statute passed by the General Assembly since 1913 gives it credible support, as the succeeding discussion will demonstrate.

A. *Clark* Is Still Good Law; § 386.510 Is the Exclusive Means of Review

Almost thirty years ago this Court ruled on the question of whether an administrative rule of the Commission should be reviewed through a writ of review in § 386.510 RSMo or by declaratory judgment. ***Union Electric Co. v. Clark***, ***supra***, held that the *exclusive* procedure for challenging a rule of the Commission is the writ of review in § 386.510 RSMo. Thus, the Opinion of the Western District is exactly the opposite of the holding in ***Clark*** and, as will be demonstrated here, the Western District's Opinion lacks a sound basis in the law.

In ***Clark,*** the issue was whether a rule of the Commission could be "challenged in a declaratory judgment action pursuant to Rule 100 or whether the exclusive procedure is that set forth in § 386.510 RSMo." ***Id.*** at 823. The challenged Commission action was its "General Order 51," which was a general statement directed at payments made by utilities

to building contractors. This Court said General Order 51 was an "agency rule." ***Id***. at 824. This Court also noted that Chapter 536 and S. Ct. Rule 100 were essentially the same in that they are review procedures for administrative agencies which, unlike the Commission, do not have their own specific and exclusive statutory procedures for review.

After examining the issue at length, this Court in ***Clark*** "conclude[d] that the Legislature provided a **special separate statutory procedure for review of an 'original order or decision' of the Commission ... and that the procedure provided for in § 386.510 is exclusive and jurisdictional.**" ***Id.*** at 825. (Emphasis added) Thus, ***Clark*** held that a declaratory judgment could not be used to challenge the lawfulness of a rule of the Commission. This Court relied on an earlier Supreme Court decision stating the same conclusion – that the review provisions of § 386.510 are "all-inclusive." ***State ex rel. State Tax Commission v. Luten***, 459 S.W.2d 375 (Mo. banc 1970).

Given the rationale presented in ***Clark***, it is surprising the Western District held the way it did in the Opinion. In stark contrast to the present situation, the Western District explicitly followed ***Clark*** as recently as 1979. In ***State ex rel. Southwestern Bell Tel. Co. v. PSC***, 592 S.W.2d 184 (Mo. App. W.D. 1979), it was presented with a declaratory judgment challenge to a rule of the Commission. There, the Western District followed ***Clark*** and said a declaratory judgment was an "improper procedural route" to challenge a rule of the Commission. ***Id.*** at 188. As recently as two years ago, the Western District said in ***State ex rel. Riverside Pipeline Company, et al. v. Public Service Commission***, 26

S.W.3rd 396, 399 (Mo.App. W.D. 2000) that "The Public Service Commission Act provides its own code for judicial review of Commission orders. [citation omitted] This statutory method of review is exclusive."

Clark is still good law. Contrary to the strained interpretation created by the Western District, nothing has changed to make it subject to question and no statutes have changed to indicate the General Assembly has any desire to change the holding in ***Clark***. Instead, as will be shown, the General Assembly has embraced the holding in ***Clark*** through subsequent legislation and has never passed a statute designed to overrule it.

1. The Meaning of "Order or Decision"

a) "Order" and "Decision" have plain and ordinary meanings

One of the foundations of the Western District's Opinion is that a decision of the PSC to promulgate a rule does not come within the scope of the phrase "order or decision" of the Commission which is found in both §§ 386.500 and 386.510 RSMo. The Opinion states (Slip op., p. 11) that there is no specific definition of either "order" or "decision" in Chapter 386, and therefore they are to be given their plain and ordinary meaning. The Opinion, however, *never mentions* the plain and ordinary meaning of "decision" which is: "the act of deciding or settling a dispute or question by giving a judgment" or "a judgment or conclusion reached or given." ***Webster's New Twentieth Century Dictionary (Unabridged)***, World Publishing Co., 1971, p. 471. Instead of applying such a plain and ordinary meaning, the Western District jumps immediately to Chapter 536 in an attempt to

discern a meaning. This reasoning process of the Western District apparently assumes that the General Assembly knew in 1913 that by using those words, a court decades later would naturally turn to a statute which would not be enacted for another 32 years in order to discern the General Assembly's real intention. There is no indication that the General Assembly in 1913 intended for the courts to rush to Chapter 536 to interpret provisions in Chapter 386, especially since Chapter 386 predates Chapter 536 by more than 30 years, so the rationale of the Western District is not sound.

The Western District does correctly recognize (Slip Opn., p. 11) that there is "no express language of restriction or limitation in §§ 386.500 and 386.510 as to what orders and decisions are subject to rehearing by the PSC and review by the circuit court ... ." If there is no such limitation, then the words should be construed broadly. The Opinion, however, does exactly the opposite: it creates restrictions. The Western District's stated rationale for this (Slip Opn., p. 11) is that since the General Assembly did not intend for non-final orders to be reviewed by the courts, as the Western District held in ***City of Park Hills v. PSC***, 26 S.W.3d 401 (Mo.App.W.D. 2000), there must be other restrictions. There is no logical basis for that statement. A finally adopted administrative rule of the Commission clearly comes within the scope of an "order" or "decision" of the Commission. It cannot rationally be compared to an interlocutory ruling in a contested case.

b) § 386.130 RSMo Also Gives Meaning to "Order or Decision"

Instead of going to another entirely different chapter to find a meaning for "order or decision," the Western District should have looked first within Chapter 386. It should have considered § 386.130 RSMo which says: "... every order and decision made by a commissioner, when approved and confirmed by the commission and ordered filed in its office, shall be and be deemed to be the order of the commission." (Emphasis added.) The Commission unquestionably pursued a *decision*-making process in deciding to issue the Rules challenged here. It also had to decide or settle a dispute about the substantive content of the Rules. Thus, it made a "decision" under the plain and ordinary meaning of that term, which therefore becomes an "order" under § 386.130 RSMo.

Instead of focusing on the implications of the plain and ordinary meaning of the term "decision," the Opinion goes to extreme lengths to attempt to divine the intent of the General Assembly in 1913 as to what it meant when it used "order or decision" in what is now § 386.510 RSMo. This is contrary to the Western District's own recognition that "order or decision" is to be given its plain and ordinary meaning.

The Commission decided on "orders of rulemaking" as an essential step in the process of making the Rules. Although "order of rulemaking" is a term unique to Chapter 536, the *decisions* of the Commission to file those "order of rulemaking" documents with the Secretary of State were "decisions" which the PSC officially approved. *See* L.F. 636, 963, and 1240. Since §§ 386.500 and 386.510 provide the exclusive process for judicial review of an "order or decision" of the Commission, it is the process to be followed in this situation, as ***Clark*** clearly and correctly held.

c) Rules Are To Be Reviewed as Orders or Decisions

On pages 12-13 of the Opinion, the Western District concludes that while the General Assembly in 1913 gave authority to the PSC to prescribe "rules and regulations," it did not define those terms or expressly provide how they were to be promulgated or reviewed. It cites § 10534, RSMo 1919 (which is now § 386.270 RSMo) which it says was the "only reference to review" of "regulations." The Opinion then says this statute did not reference "rules, only regulations, and did not provide any guidance as to how a suit challenging a regulation was to be brought." (Slip Opn. p. 13) There are several incorrect aspects to this analysis.

First, "rules and regulations" are treated under Missouri law as synonymous terms. See ***Mo. Const***. (1945) Art. IV, § 16, which says "All rules and regulations of any board or other administrative agency ... shall take effect no less than ten days after the filing thereof in the office of the secretary of state." Further, while Chapter 536 defines a "rule" and prescribes in great detail the process to be followed in promulgation of a "rule," the official compilation of those "rules" is called the ***Code of State Regulations***. § 536.031 RSMo. There is no practical difference in Missouri law between a "rule" and a "regulation." The Western District's Opinion points to none. Therefore, there is no rational basis for the Western District's attempt to draw a distinction.

Second, the Western District incorrectly concludes that § 10534, RSMo 1919 (which is now § 386.270 RSMo) has a greater scope and purpose than intended by the General Assembly. That provision clearly does not purport to set the procedure for review

of anything as indicated in the Opinion. Rather, it states that actions of the PSC, in whatever form, "are prima facie reasonable until found otherwise in a suit brought for that purpose *pursuant to the provisions of this chapter*." (Emphasis supplied) Did the General Assembly provide for such a review process in the provisions of *"this chapter?"* Yes it did. It provided a process in §§ 10521 and 10522 RSMo 1919 for "judicial review." Those sections are now codified as §§ 386.500 and 386.510 RSMo. Therefore, it was clearly the intention of the General Assembly that "all regulations ... prescribed by the commission .... shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter." § 386.270 RSMo. It is difficult to envision a clearer statement of intent than that. The General Assembly clearly is saying that suits to determine the lawfulness and reasonableness of "regulations" are to be brought pursuant to the provisions of what is now Chapter 386, not some other chapter. This is entirely consistent with this Court's holding in ***Clark***.

2. Recent Expressions of Legislative Intent

The Opinion rests on the faulty premise that the General Assembly, at various times since 1913, has evidenced some intention to have review of PSC orders and decisions (and rules) take place by means of Chapter 536. It never, however, points to a statute which specifically says that. Instead, it resorts to implications that it alone sees in changes to statutes other than §§ 386.500 and 386.510 RSMo. This Court should be wary of amendments or repeals by implication.

We have to start with the fact that §§ 386.500 and 386.510 RSMo, which are at the heart of the rationale of the Western District, have not been amended since the 1970's. Section 386.500 was last amended in 1977. Section 386.510 was last amended in 1973. The General Assembly would have been fully aware of this Court's ruling in ***Clark*** in 1977 when it amended § 386.500 RSMo. Obviously, it would have had the opportunity in 1977 to change that statute if it did not agree with the holding in ***Clark***. It did not do so. The only logical conclusion from that is that the General Assembly agreed with the holding in ***Clark***.

Sections 386.530 and 386.540 RSMo, which complement §§ 386.500 and 386.510 in the judicial review process, were also amended in 1977 -- after ***Clark*** and after the definition changes in Chapter 536 noted by the Western District. The essence of those 1977 amendments was just to recognize the existence of the newly created Office of the Public Counsel and incorporate its presence into the special review procedure. Thus, the General Assembly acted after the events relied upon by the Western District's Opinion to explicitly ratify that there still was a specific and exclusive review procedure for all orders and decisions of the Commission, including its administrative rules. The General Assembly has not enacted any statute since ***Clark*** which can legitimately be construed as overruling ***Clark***.

If the General Assembly had disagreed with ***Clark*** , it would not have made just minor changes in 1977 in sections 386.500, 386.530 and 386.540. The General Assembly

has acted to overrule *other* appellate decisions contrary to its intent in this area of public utility regulation. One example is the 1986 amendments to §§ 393.106 and 394.315 RSMo, enacted to overrule the judicially-created definition of "metering point" in ***Missouri Public Service Co. v. Platte-Clay Elec. Coop., Inc***., 700 S.W.2d 838 (Mo. banc 1985). A more recent instance is § 386.515 RSMo Supp. 2001, enacted to modify the holding in ***In Re Application of Osage Water Company***, 51 S.W.3d 58 (Mo.App.W.D. 2001), which was contrary to the holding of ***State ex rel. Anderson Motor Service Co. v. Public Service Commission,*** 339 Mo. 469, 97 S.W.2d 116 (Mo. banc 1936).

Section 386.515 RSMo Supp. 2001 contains the most recent expression of legislative intent regarding the PSC. It explicitly says "the review procedure provided for in section 386.510 is exclusive to any other procedure." Although the General Assembly could not have anticipated the novel theory underlying the Opinion when it enacted § 386.515 RSMo Supp. 2001, its enactment clearly demonstrates that the General Assembly has no intention to abandon the review process in § 386.510 for more general provisions in Chapter 536; a definite but mistaken theme of the Opinion.

B. The Western District's Opinion Relies Upon Incorrectly Construing General Statutes as Controlling Over Specific Provisions

When the same subject matter is addressed in general terms in one statute and in specific terms in another, the more specific controls over the more general. ***Greenbriar***

Hills Country Club v. Dir. of Revenue, 935 S.W.2d 36, 38 (Mo. banc 1996). The statutory interpretation theory embraced by the Western District in its Opinion, however, effectively allows a *general* provision in §536.050 RSMo to take precedence over a *specific* provision in § 386.510 RSMo. The Opinion also relies upon changes to general statutes to manufacture an intent to change specific statutes. This violates the cardinal rule of statutory construction which is that the intention of the legislature in enacting a statute must be determined and the statute as a whole should be looked to in construing any part of it. ***J.S. v. Beaird***, 28 S.W.3d 875 (Mo. banc 2000). It has also been held that "case law is not overruled by subsequent statutory changes unless the changes are directed specifically to the subject matter of the judicial interpretation." ***Bierman v. Bierman***, 657 S.W.2d 65, 67 (Mo. App. E.D. 1983). ***Clark*** correctly interprets a specific statute regarding judicial review of Commission proceedings, rejecting in the process an attempt to make general statutes control over its specific provisions.

Changes to Chapter 536 noted by the Western District were statutory changes dealing with **general** issues of administrative practice, and thus were not "directed specifically to the subject matter of the judicial interpretation" in ***Clark***. Indeed, § 536.050 RSMo, a general statute dealing with declaratory judgments regarding administrative rules, was first enacted in 1945, some 29 years before ***Clark*** was decided, and thus could have been considered by this Court in ***Clark***. There were definitions of "contested case" and "rule" enacted in 1945 in Chapter 536 and in existence at the time of

Clark which are not substantively different from the present definitions. *See*, § 536.010 RSMo 1959. Therefore, this Court in ***Clark*** could have considered whether the General Assembly in 1945 intended for the PSC's rules to be reviewed only via Chapter 536. It did not do that, and the General Assembly has never passed a law which changes the holding in ***Clark***, so the only logical conclusion is that the General Assembly agrees with ***Clark***. Therefore, the general statutory changes in either 1945 or the mid 1970's to Chapter 536 cannot reasonably be interpreted as signal that the General Assembly intended to modify ***Clark.*** Simply put, there is no objective or specific evidence of the legislative intent fabricated by the Opinion.

The Western District's Opinion also improperly elevates the general over the specific when it determined that an amendment to Chapter 536 in 1976 dealing with rulemaking in general effectively overrides a specific provision in Chapter 386 calling for an evidentiary hearing in a Commission rulemaking proceeding. Contrary to the Opinion, the 1976 amendment expanding the definition of the term "rule" in Chapter 536 RSMo does not apply to specific requirements in Chapter 386. It and the other definitions are clearly "for the purpose of this chapter [536] " only. *See*, § 536.010 RSMo.

The Opinion also incorrectly attempts to draw an impenetrable barrier between "rules" and "contested cases" which is not supported by the statutes themselves. Chapter 536 does provide separate definitions for "rules" and "contested cases" but it does not say that aspects of a contested case can never be employed in a rulemaking. The Western

District apparently concludes in its discussion at Slip p. 17 that these are two "distinct powers" so they must have distinct review procedures. Again, by relying only on provisions in Chapter 536, and ignoring the plain language in § 386.250(6) RSMo, the Western District elevates general provisions over specific ones.

The Western District apparently believes that a rule can never be a contested case. That is not what the statutory definition in Chapter 536 says. It says a "*determination, decision or order* in a contested case" does not qualify as a "rule" for purposes of Chapter 536. (Emphasis supplied) In other words, the decision itself in a contested case, by definition, is not a statement of general applicability that is implementing policy, and thus is not a "rule" for purposes of Chapter 536. That statement does not mean a rulemaking proceeding can never have an evidentiary hearing, as the Western District apparently concludes. In fact, the very statute relied upon by the Western District to support its conclusion – section 386.250(6) RSMo – *explicitly* requires an evidentiary hearing. Simply put, a definition in Chapter 536 -- created for purposes of that chapter alone -- can not negate a *specific* statutory requirement for an evidentiary hearing in Chapter 386.

For some inexplicable reason, the Western District sought to undermine the holding in ***Clark***. The Western District noted that it was authored by a commissioner, and also said this Court failed to look at Rule 87 on declaratory judgments in deciding ***Clark***. As to the former, the Appellants fail to comprehend what difference it makes. As to the latter, it is baseless and circular reasoning since Rule 87 is a *general* provision, not a *specific* judicial review provision for a specific agency. The notion that a declaratory judgment could be

used to challenge a decision of the Commission was correctly rejected by this Court many years ago. ***State ex rel. Blair and to Use of PSC v. Blair***, 347 Mo. 220, 146 S.W.2d 865 (Mo. 1941). This Court said in ***Blair*** that a decision rendered by a court in a manner different than a writ of review would not be binding upon the Commission. 146 S.W.2d at 870. This is sound reasoning because to hold otherwise renders meaningless the explicit provision in § 386.510 RSMo that "*No court in this state,* ***except the circuit courts to the extent herein specified*** and the supreme court or the court of appeals on appeal, *shall have jurisdiction to review,* reverse, correct or annul any order or decision of the commission or to suspend or delay the executing or operation thereof, or to enjoin, restrain or interfere with the Commission in the performance of its official duties." (Emphasis supplied) As the Western District properly recognized in ***Southwestern Bell***, supra, that provision "evidenced a legislative intent to require venue in Cole County alone ... [for the] ease of litigation on the part of the Commission and uniformity of application of the complex law of the regulation of public utilities... ." 592 S.W.2d at 187-188.

Abandoning what it said in ***Southwestern Bell*** and attributing a totally different and inconsistent intent to the General Assembly in 1913 via its novel theory, the Western District's Opinion now suggests (Slip, p. 13-14) that only "complaint" cases from the Commission are subject to review under the §§ 386.500-386.510 RSMo process, and therefore a challenge to a Commission rule can only be made via § 536.050 RSMo. As such, the Opinion is in direct conflict with ***Clark***, ***Luten***, ***Southwestern Bell***, and numerous

other cases using that special review process over the decades, including ***State ex rel. City of Springfield v. PSC***, 812 S.W.2d 827 (Mo.App. W.D. 1991) (overruled on other grounds in ***Missouri Mun. League v. State***, 932 S.W.2d 400, 402 (1996)) which was a case where the Western District specifically reviewed a challenge to rules brought via §§ 386.500-386.510.

1. Enactment of § 386.250.6 RSMo in 1977 Does Not Show Legislative Intent to Overrule *Clark*

The Western District's Opinion (Slip, p. 18) relies heavily on the 1977 enactment of what is now subsection (6) of § 386.250 RSMo. It says the enactment expressly authorized the PSC to promulgate rules relating to utilities but "it made no reference to challenges to their validity being subject to the review procedures of §§ 386.500 and 386.510."

The Appellants submit that the General Assembly obviously saw no need to make such a provision as envisioned by the Western District, since just three years before ***Clark*** clearly said rules were to be considered as "orders or decisions" of the PSC and that challenges to the PSC's rules could only be brought pursuant to §§ 386.500 and 386.510 RSMo. Therefore, there already existed in 1977 in Chapter 386 a clear and sufficient procedure for such review. So there was no need for the General Assembly to repeat the obvious in the statute, as the Western District suggests. The General Assembly's wise decision in 1977 not to insert a redundant provision should not now be judicially reversed to become a basis for the Western District's theory. Instead, it can more rationally be

argued that since the General Assembly *did* make a statutory change in 1977 regarding rules, and it is presumed to have been aware of ***Clark*** at the time, it did not intend to change the holding in ***Clark*** because it had the opportunity to do so, and it did not.

The addition of what is now § 386.250(6) in 1977 accomplished several things. It gave the PSC additional subject matter jurisdiction to enact rules which, despite the various grants of authority discussed elsewhere in this brief, it did not possess before. It mandated that the filing and publication procedures utilized for those rules would be those set forth in the then recently-enacted provisions in Chapter 536. It did not purport, however, to subject such rule-making actions to the judicial review provisions of Chapter 536. To the contrary, by explicitly referencing the filing and publication requirements in Chapter 536, while making no reference to the procedures for obtaining judicial review in Chapter 536, the language of § 386.250(6) strongly indicates that actions taken pursuant to its provisions are not subject to judicial review under Chapter 536. Chapter 536 contains provisions by which the General Assembly made clear that Chapter 536 did not purport to replace special review requirements it had enacted.

Moreover, § 386.250(6) also contains a special provision which required the PSC to follow special procedures in enacting the rules under § 386.250(6). Those special procedures are not found in either Chapter 536 or elsewhere in Chapters 386 or 393. The General Assembly required any rules under that provision to first be subjected to a "**hearing** ... at which affected parties may present evidence as to the reasonableness of any proposed rule."

That specific grant of additional rule-making authority in § 386.250(6) with special hearing conditions did not alter the general scope of Chapter 386. There is nothing in those two sentences in § 386.250(6) which purport to make such a sweeping change, which is another faulty rationale for the Opinion.

2. Enactment of § 394.312 RSMo in 1988 Does Not Show Legislative Intent to Overrule *Clark*

The Western District also relies (Slip, p. 19) on the enactment in 1988 of § 394.312 RSMo as a basis for its rationale. The Western District suggests that because a review procedure for complaints was specified in that enactment, but no mention was made of rules, challenges to PSC rules were thereafter to be made by declaratory judgment. There is absolutely no objective indication the General Assembly had the intent the Western District ascribes to it here. Coming as it did some 14 years after ***Clark*** this was yet another opportunity for the General Assembly to reject the holding in ***Clark***. Again, it declined to do so.

The only reason the reference to a review procedure appears in §394.312 RSMo is that Chapter 394 is not one of the chapters containing the powers of the PSC. This is evidenced by the Revisor of Statutes' footnote to § 386.010 which clarifies that "The Public Service Commission Law" does not encompass Chapter 394. Rather, Chapter 394 is about rural electric cooperatives which do not have their rates set by the PSC and are not under the PSC's general supervision and jurisdiction. Chapter 394 does not have any specific review procedure applicable to it, as does Chapter 386.

Contrary to the assumption of the Opinion, in enacting § 394.312 RSMo, the General Assembly deemed that "state action" was necessary for the approval of territorial agreements between certain types of utilities in order to avoid potential anti-trust problems. The PSC was chosen to accomplish the "state action" task by giving its approval to the agreements. Since this was a new and separate procedure being created in a chapter of the statutes that was not part of the PSC Law (See Revisor's footnote, *supra*) and there was the potential for confusion about how decisions of the PSC would be reviewed as a result of the addition of the section to Chapter 394, the General Assembly determined that it was necessary to state what review process would be followed. It did just that. It said in subsection 4 that review of Commission decisions regarding the approval of territorial agreements themselves would be by the exclusive procedure in "sections 386.500 to 386.550." Thus, it clearly evidenced its intention that a review of a PSC decision on those types of matters would be taken pursuant to the same provisions as other PSC "orders or decisions." In doing so, it impliedly rejected the notion that review of those orders or decisions would be by Chapter 536 or Rule 100 or some other procedure.

The General Assembly also provided in § 394.312.6 RSMo for an expansion of the "complaint" jurisdiction of the PSC by allowing the filing of complaints with the PSC regarding territorial agreements. This provision expanded the subject matter jurisdiction for complaints beyond that specified in § 386.390 RSMo. Therefore it was entirely appropriate for the General Assembly to expand the "complaint" jurisdiction in § 386.390 RSMo to create this new procedure.

Significantly, though, no objective indication exists from the passage of § 394.312 RSMo that the General Assembly had any intentions with regard to changing the scope of the phrase "order or decision" in § 386.500 RSMo. It never even referred to those terms. It simply provided that if the PSC made a decision under this new territorial agreement procedure, the *same* review process as for other PSC decisions would be available. In other words, it would be the *exclusive* review process in Chapter 386; not Chapter 536. The only reason it was necessary to state that process was to be followed was that the provision was being placed in Chapter 394, to which §§ 386.500 and 386.510 RSMo arguably would not otherwise automatically apply.

The General Assembly also had no reason to suspect in 1988 when it enacted § 394.312 that the law on review of PSC rules or decisions was anything but what had been clearly declared in ***Clark*** in 1974 and subsequently re-applied in ***Southwestern Bell*** in 1979. The rationale of the Opinion to find some shred of intent to the contrary is strained, baffling, and unsupported by anything concrete or objective.

C. The Western District's Opinion Renders Meaningless the Jurisdictional Provisions in Supreme Court Rule 100.01 and § 536.100 RSMo.

The Western District's Opinion is also faulty because it renders meaningless jurisdictional provisions in Supreme Court Rule 100.01 and § 536.100 RSMo. At page 14 of the Opinion, the Western District apparently concludes that the exclusive review procedure for "orders or decisions" of the Commission only applies to "complaints." As a

consequence of that, Commission cases which are not "complaints," meaning tariff filings by utilities which institute general rate cases, or applications for other various forms of relief apparently would fall into either "contested" or "non-contested cases" reviewable under Chapter 536.

As is the case with the other conclusions in the Opinion, there is no objective evidence that the General Assembly intended this result. In fact, the passage of Section 386.515 RSMo Supp. 2001 expressly negates that conclusion.

Rule 100.01 regarding judicial review of administrative decisions in circuit court provides that the provisions of §§ 536.100 through 536.150 RSMo shall govern "unless the statute governing a particular agency contains different provisions for such review." (Emphasis supplied) Section 536.100 RSMo contains essentially the same provision: "... unless some other provision for judicial review is provided by statute."

Clearly, the special review procedure in §§ 386.500, 386.510, 386.520, 386.530, and 386.540 RSMo contains *different* provisions for the review of an order or decision of the Commission. This fact was recognized by this Court in both ***Clark*** and ***Luten***, supra, and a similar separate procedure (which has apparently since been eliminated by the General Assembly) was noted in ***Brogoto v. Wiggins***, 458 S.W.2d 317 (Mo. 1970). If the rationale of the Opinion is followed, those provisions in Rule 100.01 and § 536.100 RSMo which recognize the existence of other provisions for judicial review are rendered meaningless.

In summary, this Court should recognize that the General Assembly has taken no discernable, measurable, or objective steps to put the review of decisions of the PSC into Chapter 536. Instead, just last year, it said Chapter 386 continues to have an exclusive review process. § 386.515 RSMo Supp. 2001. Therefore, the rationale of the Western District lacks any reasonable foundation and should be rejected.

D. The Western District Erroneously Ascribes an Intent to the General Assembly in 1913 Which Cannot Be Reconciled With the Other Provisions of the Public Service Commission Law

In much the same fashion as the Western District attempts to fabricate legislative intent regarding statutory changes in the mid 1970's, the Opinion reaches back to the enactment of the PSC law in 1913 to produce its novel theory which suggests only "complaint" cases fall into the special review procedure for orders and decisions of the Commission. Other than its physical proximity to the complaint section, there is nothing in the content of § 10521 RSMo 1919 (now § 386.500 RSMo) which, on its face, limits its application to only orders or decisions arising from complaint cases. Although the Opinion concludes that, it certainly cites no statutory language to that specific effect. The Opinion erroneously affords far too much weight to the simple fact that § 10518 RSMo 1919 on "complaints" and §§ 10521 and 10522 on "judicial review" appeared in close proximity in the original act. While they should be read *in pari materia* because they are in the same act, that does not mean they should be read so narrowly as to only apply to *each*

other, and to the exclusion of all the other statutes relating to the same subject matter, as the Opinion indicates.

The logical result of the Western District's theory is that utility rate cases initiated by the "file and suspend" procedure in § 393.150 RSMo cannot proceed under the special review procedure in Chapter 386. The "file and suspend" procedure was recognized in ***State ex rel. Jackson County v. PSC***, 532 S.W.2d 20, 28-29 (Mo. banc 1975), *cert. denied*, 429 U.S. 822 (1976), as being an equally valid method for changing utility rates as a "complaint." Under the rationale of the Opinion, however, those rate cases initiated under the file and suspend procedure must be reviewed as either contested or non-contested cases via Chapter 536, while a rate case initiated by the complaint procedure would still proceed to judicial review under Chapter 386.

This is an absurd result because the "file and suspend" procedure was just as much a part of the original PSC Law in 1913 as the "complaint" procedure, and therefore subject to the same review procedure. See § 10479 RSMo 1919. There was only one judicial review procedure in the original PSC law. The original PSC law appears in Chapter 95 of RSMo 1919. It was divided into seven different "articles." One of the articles, no. VI, was entitled "procedure before commission and courts." The review procedure appeared only in that article while some of the substantive provisions were repeated several times depending on whether they applied to common carriers, telephone companies, railroads, or other utilities. Significantly for purposes of attempting to understand the rationale of the Opinion, there were not *separate* review procedures specified for each of the articles or

even for the different groupings of utilities. **There was only one review procedure specified for an "order or decision" of the Commission.**

That procedure called for an application for rehearing to be made "after an order or decision has been made by the commission." There are no limiting terms in that phrase such as "after an order or decision has been made by the commission *in a complaint*" or "after an order or decision has been made by the commission *concerning a regulation.*" The rehearing application is mandatory and strict if the applicant for rehearing wishes to seek judicial review of the "order or decision." It specifies that no one "shall in any court urge or rely on any ground not so set forth in said application." After a rehearing has been denied, the procedure calls for a "writ of review" to be issued by the applicable circuit court to review the decision. This is not an "appeal" but a special review procedure. ***State ex rel. Southwestern Bell Tel. Co. v. Brown,*** 795 S.W.2d 385 (Mo. banc 1990).

Therefore, the Western District's Opinion also effectively overrules this Court's opinion in ***Jackson County***, which was followed in ***State ex rel. Utility Consumers Council of Mo. v. PSC***, 585 S.W.2d 41, 48 (Mo. banc 1979), and sets up a different review procedure for judicial review of utility rate cases depending on whether the utility or someone else initiates it.

The Opinion commits the same logic error that was exposed in ***Jackson County***. In that case, this Court examined the same complaint statute and concluded that it was not, as alleged there, the <u>only</u> method by which a utility could seek to increase its rates. ***Jackson***

County recognized the "file and suspend" method in § 393.150 RSMo, which had its origin in § 10478 RSMo 1919. This Court said there that it "has recognized that all of the statutes (sic) reference rates and charges must be read and interpreted with reference to the others." ***Id.*** at 28. This Court also noted that all of the interested parties had accepted the file and suspend method as proper for proposed rate changes and noted the long history of approval of the process. It said that "a court should refrain from substituting a new and novel interpretation thereof." ***Id.*** at 29. The Western District obviously is not following that direction of this Court.

If followed, the Opinion also changes the venue and the standard of review of Commission decisions. The venue and jurisdiction provisions for writs of review in § 386.510 RSMo are totally different from the venue and jurisdiction provisions in § 536.050 and § 536.100.3 RSMo. Under § 386.510 RSMo, a writ of review can only be filed in a circuit court in the county in which a hearing was held, or where the PSC has its principal office. Under § 536.050, a declaratory judgment can be filed in Cole County, the county of the plaintiff's residence, or the county in which a corporation maintains a registered office or business office. The General Assembly in 1913 clearly said it wanted to restrict which courts would consider writs of review from the PSC. It gave no intention of allowing review where the plaintiff maintained a residence or a corporation maintained an office. The Opinion totally ignores that clear language and improperly seeks to apply a totally different and inconsistent review procedure than the one intended by the General Assembly.

Similarly, some provisions in Chapter 536 allow for *de novo* review in the courts. The General Assembly, however, has clearly said in § 386.510 RSMo that it wants to restrict what courts can consider writs of review from the Commission, and to restrict the scope of review to "reasonable and lawful." The General Assembly has given no intention of allowing judicial review of rate cases where the "plaintiff" utility maintains a corporate office or an "applicant" in some other proceeding maintains a residence. The Opinion ignores that clear language and improperly seeks to apply a totally different and inconsistent review procedure than the one clearly intended by the General Assembly.

The Opinion also mandates a scheme of judicial review which cannot be reconciled with other provisions of the PSC Law. For example, §393.150.2 RSMo provides that whenever an increased rate for utility service is proposed the "commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible." Notably, the General Assembly has determined this same preference for the timely review and disposition of PSC cases should also be carried through and observed in the appellate process, as evidenced by §386.530 and §386.540.2 RSMo which direct the courts to give preference to PSC cases over other civil matters. By limiting the review under Chapter 386 to just "complaint" cases, which are a distinct minority of the cases considered by the PSC, the Opinion effectively eviscerates this legislative intent since no language of a similar nature appears in Chapter 536.

Similarly, §386.270 RSMo provides that "all regulations, practices and services prescribed by the [PSC] shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter." (Emphasis added) By its explicit terms, this section unequivocally demonstrates that Chapter 386 is the only one that may be used to obtain a judicial determination that a regulation, practice or service prescribed by the Commission is not lawful or reasonable. The Opinion, however, suggests the lawfulness or reasonableness of a regulation, practice or service prescribed by the Commission can be challenged in suits brought under the provisions of *entirely different* chapters – a construction that is impossible to reconcile with §386.270 RSMo. The accuracy of this analysis showing the error of the Western District is buttressed by the all-encompassing language in § 386.510 RSMo quoted earlier which restricts court review of Commission actions "to the extent herein specified... ." (Emphasis added)

It is obvious that the General Assembly intended for utilities subject to the jurisdiction of the PSC to obey all the orders and decisions of the PSC under penalty of law. For example, § 10492 RSMo 1919 directed every utility to "comply with every **order and decision** of the commission under authority of this chapter ... ." Failure to comply was subject to a fine. In addition, every distinct violation of any such order or decision was deemed to be "a separate and distinct offense." These provisions are very similar to those in § 386.570 RSMo today. Notably, though, as provided in § 386.600 RSMo, "if the defendant in such action [to recover penalties] shall prove that during any portion of the

time for which it is sought to recover penalties or forfeitures for a violation of an order or decision of the commission the defendant was actually and in good faith prosecuting a suit **to review such order or decision in the manner as provided in this chapter**, the court shall remit the penalties or forfeitures incurred during the pendency of such proceeding." (Emphasis supplied) The legislature also authorized the PSC's general counsel to go to circuit court, through mandamus or injunction actions, to prevent the threatened or anticipated violation of any "order or decision" of the PSC. See § 10493 RSMo 1919 and § 386.360 RSMo.

It would be wholly inconsistent for the General Assembly, after authorizing the PSC to enact many types of rules in 1913, to simultaneously render them ineffectual by not intending that "rules" be encompassed by the phrase "order or decision." The phrase "order or decision" therefore must encompass rules and regulations; otherwise, it presents the absurd result that the PSC's rules cannot be enforced by the PSC through injunction or mandamus.

Another conflict is presented if the rationale of the Opinion is adopted that only complaint cases are subject to the review provisions in Chapter 386. This is evidenced, at a minimum, by the text of § 10523 RSMo 1919 (now § 386.520 RSMo) which provides for the possibility of a stay and impoundment of funds during the pendency of the writ of review "in excess of the charges fixed by the order or decision of the commission." It has long been recognized that the PSC may approve a tariff change, including a rate change, simply by allowing a proposed tariff to take effect. ***State ex rel. Laclede Gas Co. v. PSC***,

535 S.W.2d 561 (Mo.App.K.C. 1976). The power of the PSC to do that is not found in the *complaint* provision. It was a part of the original act and is found in the general powers section: § 10478 RSMo 1919 and §393.140(11) RSMo. Therefore, the logic and result of the Opinion is that there is no stay provision available if the PSC alters rates by other than the "complaint" method. This produces an absurd result, because the text of § 10478 RSMo 1919 and § 393.140(11) RSMo clearly indicate the General Assembly's wish that the circuit court, during a writ of review, have the power to stay or suspend the effect of any rate change. Further, there is no indication in that section that it only applies to "complaint" proceedings because there is no reference in it to "complaints."

E. Summary

As this Court is aware, the PSC sets the utility rates for millions of Missourians. The Western District's Opinion, if allowed to stand, effectively throws out 89 years of precedent by shifting judicial review from Chapter 386 to Chapter 536 for the vast majority of utility rate cases and other proceedings which can affect rates. Whether realized by the Western District or not, the Opinion does not represent a simple application of some principle or provision from Chapter 536 to fill a perceived "gap" in the special procedures in Chapter 386. Rather, it upsets and throws into turmoil the review process in Chapter 386 which has been followed and interpreted since 1913.

The Opinion effectively rules that all pending writs of review, unless by happenstance they are the result of a decision in a "complaint" case, have been improperly brought and are to be dismissed on jurisdictional grounds. This is an issue of immense

importance to parties and practitioners who appear before the Commission, but it is also an issue of extreme importance to the Commission itself, to the reviewing courts, and to the public that is affected by decisions in rate cases at the Commission and who pay the rates established by it.

Upholding or utilizing the Western District's rationale means that courts are suddenly deprived of subject matter jurisdiction, which could have a disastrous effect on parties who have filed petitions for writ of review and who have complied with the provisions clearly established by existing Missouri case law.

The special review procedure for orders or decisions of the Commission has remained substantially unchanged since enactment in 1913, and was recognized as continuing to be a special review procedure even after enactment of the Administrative Procedure Act in 1945 and substantial changes to the APA in 1975. Courts have so held over the intervening years. In ***Jefferson Lines, Inc. v. MoPSC***, 581 S.W.2d 124 (Mo.App. 1979) the Western District focused on the "special statutory form of review" of § 386.510 RSMo, holding that a declaratory judgment of a Commission decision was not appropriate. There, the Western District cited ***Clark*** with approval to the effect that an action under § 536.050 is <u>not</u> available when a special statutory procedure exists. ***Jefferson Lines,*** 581 S.W.2d at 127. The Western District in that case also *rejected* the notion that the passage of changes to the APA in 1975 had any bearing on that special review status. ***Id.*** at 126. In stark contrast to ***Jefferson Lines***, the Western District's Opinion in this case pointed to no

clear or objective actions of the General Assembly which alter the reasoning uniformly followed since the passage of the Public Service Commission Law in 1913. The Supreme Court should reject the rationale of the Opinion and proceed with a decision in this case on the merits rather than attempt to change the judicial review process on the flimsy and erroneous justification presented by the Western District in the Opinion.

CONCLUSION

The Western District had subject matter jurisdiction to consider the action which was before it.

The Rules are unlawful because they are beyond the subject matter jurisdiction of the Commission. Since they purport to control activities of companies not subject to the Commission's jurisdiction, not only does the Commission lack authority to enact such Rules, what has been enacted is contrary to the prohibition in § 393.140(12) RSMo that the Commission's jurisdiction does not attach to unregulated operations. Furthermore, the Commission's failure to cite proper legal authority for 4 CSR 20-80.015 as required by law means that it is "null, void and unenforceable" as a matter of law.

What the Commission enacted is fraught with impermissibly vague terminology that violates due process rights.

Even if it is assumed that the Commission had authority to enact these Rules, they were unlawfully adopted because the Commission did not provide an evidentiary hearing as

required by governing statute. The Commission also failed to comply with other applicable statutes which mandated an evidentiary hearing.

As a result, the Court should declare the Rules to be void.

Table of Cases and Other Authorities

Cases:

Statutes and Other Authorities:

Other Authorities:

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Certificate of Service

I hereby certify that two copies of the foregoing in printed fashion and one copy in computer diskette fashion have been hand-delivered to the Office of the General Counsel of the Missouri Public Service Commission, and the Office of the Public Counsel this 13th day of May 2002, addressed as follows:

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Certification Regarding Rule 84.06(c)

Pursuant to Rule 84.06(c), the undersigned counsel hereby certifies that this brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b) and that, according to the word count feature in WordPerfect Suite 8 the entire document contains 22,098 words. The undersigned also certifies that it is filing with this brief a computer diskette which contains a copy of the foregoing brief, which was prepared using WordPerfect Suite 8, and further certifies that the diskette was scanned for viruses utilizing Norton Utilities software which shows it was virus-free.

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